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Kathryn A. Piper

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arch 2, 1984 for the First Circuit

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ntry	Date	Note	Proceedings and Orders
1	Mar 2 1984	G	Statement as to jurisdiction filed.
2	Apr 4 1984		DISTRIBUTED. April 20, 1984
3	Apr 5 1984	X	Motion of appellee Kathryn A. Piper to affirm filed.
4	Apr 23 1984		PROBABLE JURISDICTION NOTED.
5	May 24 1984		Order extending time to file brief of appellant on the merits until June 18, 1984.
7	Jun 18 1984		Brief of appellant Sup. Ct. of NH filed.
8	Jun 18 1984		Joint appendix filed.
9	Jun 18 1984		Brief amicus curiae of Iowa filed.
10	Jun 18 1984		Brief amicus curiae of Tennessee filed.
11	Jun 18 1984		Brief amicus curiae of Commonwealth of VA, et al. filed.
13	Jun 26 1984		Order extending time to file brief of appellee on the merits until July 30, 1984.
14	Jun 29 1984		Record filed.
15	Jun 29 1984		Certified copy of C. A. proceedings, appendix and supplemental briefs received.
16	Jul 24 1984		Brief amicus curiae of Public Citizen, Inc. filed.
17	Jul 26 1984		Brief amicus curiae of Vermont Bar Assn. filed.
18	Jul 30 1984		Brief amicus curiae of American Corporate Counsel Assn. filed.
19	Jul 30 1984		Brief of appellee Kathryn A. Piper filed.
20	Aug 21 1984		CIRCULATED.
21	Aug 28 1984		SET FOR ARGUMENT. Wednesday, October 31, 1984. (2nd case)
22	Oct 23 1984	X	Reply brief of appellant Sup. Ct. of NH filed.
23	Oct 31 1984		ARGUED.

1-4-85

JURISDICTIONAL

STATEMENT

83-1460 (1)

No. 83-____

Office - Supreme Court, U.S.
FILED
MAR 2 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SUPREME COURT OF NEW HAMPSHIRE

Appellant

v.

KATHRYN A. PIPER

Appellee

On Appeal From The United States Court Of Appeals For The First Circuit

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED BY THE APPEAL

1. Does the privileges and immunities clause of Article IV, Section 2 of the United States Constitution limit the authority of the highest court of a State to adopt and enforce a rule imposing a requirement that persons seeking admission to the State bar be residents of the State at the time of their admission.

2. Do the standards of judicial scrutiny under the privileges and immunities clause, as enunciated by the Court in *Toomer* v. *Witsell*, 334 U.S. 385 (1948) and *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978), govern federal judicial review of residence requirements for admission to the bar of a State?

3. Do federal courts improperly invade the authority of a State's highest court to define and regulate the practice of law, where they fail to accord proper deference to a determination by the State court that non-residence at the time of bar admission will interfere with lawyers' availability for court schedulings, continuing legal education, participation in the activities of the unified bar, volunteer service, civic activities, peer pressure upon proper professional conduct and similar matters bearing on the obligations of members of the State's bar?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	3
STATEMENT OF THE CASE	3
STATEMENT OF REASONS WHY PLENARY CONSIDERATION IS REQUIRED	5
CONCLUSION	16
APPENDIX	1a

TABLE OF AUTHORITES

CASES:	Page
Bates v. *State Bar of Arizona*, 433 U.S. 50 (1977)	6, 9
Bradwell v. *Illinois*, 83 U.S. (16 Wall) 130 (1873)	6, 16
District of Columbia Court of Appeals v. *Feldman*, ___ U.S. ___, 103 S. Ct. 1303 (1983)	6
Doran v. *Salem Inn, Inc.*, 422 U.S. 922 (1975)	2
Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975)	6, 8
In Re Griffiths, 413 U.S. 717 (1973)	14, 15, 16
Hicklin v. *Orbeck*, 437 U.S. 518 (1978)	6, 7, 8, 9, 13
King Manufacturing Company v. *City Council of Augusta*, 277 U.S. 100 (1928)	2
Leis v. *Flynt*, 439 U.S. 438 (1979)	6, 8
In Re Lockwood, 154 U.S. 116 (1894)	6
Middlesex County Ethics Committee v. *Garden State Bar Ass'n.*, ___ U.S. ___ 102 S.Ct. 2515 (1982)	6, 9, 16
Nofolk & Western Ry Co. v. *Beatty*, 423 U.S. 1009 (1975)	6
Schware v. *Board of Bar Examiners*, 353 U.S. 232 (1957)	6
Toomer v. *Witsell*, 334 U.S. 385 (1948)	6, 9, 9, 12
United States v. *Howard*, 352 U.S. 212 (1957)	2
Wilson v. *Wilson*, 416 F. Supp 984 (D. Oregon 1976) aff'd mem. 430 U.S. 925 (1977)	6
Zobel v. *Williams*, 457 U.S. 55 (1982)	15

UNITED STATES CONSTITUTION:

Article IV, Section 2 ..... *passim*

STATUTES AND RULES:

New Hampshire Supreme Court Rule 42 ..... 2, 3, 4, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 84-__

SUPREME COURT OF NEW HAMPSHIRE

Appellant

v.

KATHRYN A. PIPER

Appellee

On Appeal From The United States Court Of Appeals For The First Circuit

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Opinion of the United States District Court for the District of New Hampshire was reported at 539 F. Supp. 1064, and is set forth in the Appendix to the Jurisdictional Statement.

The original Opinion of the United States Court of Appeals for the First Circuit, reversing the judgment of the District Court, was issued on May 25, 1983, and was to be reported at 708 F.2d 825. The Court of Appeals subsequently ordered rehearing *en banc*. The original Opinion was withdrawn and is included in the Appendix to the Jurisdictional Statement.

The Opinions of the Court of Appeals on rehearing, *en banc*, were equally divided, and the Court of Appeals

thereupon affirmed the decision of the District Court. The Opinions have not yet been officially reported, and are included in the Appendix to the Jurisdictional Statement.

JURISDICTION

The appellee, plaintiff in the District Court, brought this action to declare New Hampshire Supreme Court Rule 42 unconstitutional and to enjoin its enforcement by the New Hampshire Supreme Court, pursuant to 42 U.S.C. § 1983. Jurisdiction in the District Court was predicated upon 28 U.S.C. §§ 1331 and 1343, and upon 28 U.S.C. §§ 2201 and 2202.

The Supreme Court of New Hampshire now appeals from the judgment of the United States Court of Appeals for the First Circuit, dated December 5, 1983, which affirmed the judgment of the District Court by an equally divided vote of the Court of Appeals, *en banc*. On August 2, 1983, the Court of Appeals had granted the Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc, and vacated its original Opinion issued May 25, 1983, which had reversed the judgment of the District Court.

The Supreme Court of New Hampshire filed its notice of Appeal in the Court of Appeals on December 27, 1983. The Supreme Court of New Hampshire filed an Amended Notice of Appeal in the Court of Appeals on January 6, 1984.

The jurisdiction of this Court on appeal is invoked under 28 U.S.C. § 1254 (2). New Hampshire Supreme Court Rule 42 is "state statute" within the meaning of 28 U.S.C. §§ 1254 (2) and 1257. *See e.g., Doran* v. *Salem Inn, Inc.* 422 U.S. 922 (1975); *United States* v. *Howard*, 352 U.S. 212 (1957); and *King Manufacturing Company* v. *City Council of Augusta*, 277 U.S. 100 (1928).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The privileges and immunities clause, Article IV, § 2 of the United States Constitution, provides in pertinent part:

> "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

New Hampshire Supreme Court Rule 42(3) provides:

> "Any person domiciled in the United States and who either is a resident of the State of New Hampshire or files a statement of intention to reside in the State of New Hampshire shall be eligible to apply for examination provided he is of the qualifications hereinafter provided."

New Hampshire Supreme Court Rule 42(8) provides:

> "Except upon approval of the Supreme Court for good cause shown, the oath of admission required by RSA 311:6 must be administered within two years from the time the applicant has been notified of the successful passing of the bar examination or said examination must be taken again and passed."

The New Hampshire Supreme Court has construed its Rules 42(3) and (8) to require residence in the State at the time the oath of admission is administered.

STATEMENT OF THE CASE

The Appellee, Kathryn A. Piper, is a resident of the State of Vermont and a member of the Vermont Bar. In 1979, she applied for permission to take the February, 1980 New Hampshire bar examination, and signed, under oath, a statement of intent to establish residency in New Hampshire. Ms. Piper took and passed the New Hampshire bar examination.

In April, 1980, Ms. Piper was notified that she had passed the bar examination, and would be eligible for admission to the New Hampshire bar upon establishing residence in the State. Ms. Piper subsequently requested, by letter, to be exempted from the residency requirement. Her request was denied by the New Hampshire Supreme Court on May 13, 1980. She then filed a "formal petition" with the New Hampshire Supreme Court seeking exemption from the residency requirement. Her "petition" was denied by the New Hampshire Supreme Court on December 31, 1980.

On March 22, 1982, Kathryn Piper filed a complaint in the United States District Court for the District of New Hampshire, asserting that the New Hampshire bar residency requirement violated her constitutional rights, including the privileges and immunities guaranteed by Article IV, Section 2 of the United States Constitution. The issues presented to this Court were initially raised in the District Court by Ms. Piper's Motion for Summary Judgment, and the New Hampshire Supreme Court's Motions to Dismiss. On May 17, 1982, the District Court granted Ms. Piper's Motion for Summary Judgment, holding that New Hampshire Supreme Court Rule 42 violated the privileges and immunities clause of the federal Constitution, and enjoined the New Hampshire Supreme Court from enforcing the residency requirement.

The issues now raised on this appeal were raised by the appellant, the New Hampshire Supreme Court, in its appeal to the United States Court of Appeals for the First Circuit. The Court of Appeals stayed the judgment of the District Court pending appeal. On May 25, 1983, the Court of Appeals initially reversed the judgment of the District Court and held, in a 2-1 decision, that New Hampshire's residency requirement was constitutional. On August 2, 1983, the First Circuit Court of Appeals granted Piper's Petition for Rehearing *en banc*. On December 5, 1983, the Court of Appeals for the First Circuit affirmed the judgment of the District Court by an equally divided 2-2 panel. On December 27, 1983, the Court of Appeals continued its stay of the District Court's judgment, pending appeal to this Court.

A timely Notice of Appeal and Amended Notice of Appeal were filed in the Court of Appeals.

STATEMENT OF REASONS WHY PLENARY CONSIDERATION IS REQUIRED

A. Introduction

This case presents the first federal appellate-level consideration of whether the privileges and immunities clause prohibits State courts from maintaining simple residency requirements for admission to the bar, in the exercise of their authority to define and regulate the practice of law in their jurisdictions. Some twenty-seven States currently maintain residency requirements in various forms. As applied by the New Hampshire Supreme Court, New Hampshire's requirement is the "simplest" of such requirements; residency is not required at any point prior to actual bar admission. Candidates for bar admission may complete all other requirements on the strength of a statement of intent to acquire New Hampshire residence at the time of admission. If the result below is permitted to stand, it will establish a precedent affecting all bar admission residency requirements in other States. Accordingly, resolution of the general questions presented involves determination of constitutional questions of broad and immediate national impact.

Resolution of the questions involves first, a determination whether the privileges and immunities clause was

intended to impinge on State court control over the practice of law, an issue previously decided in the negative by this Court. *In Re Lockwood*, 154 U.S. 116 (1894); *Bradwell* v. *Illinois* 83 U.S. (16 Wall) 130 (1873) Beyond that threshold issue lies another fundamental issue concerning State-federal relationships: the degree to which federal courts may substitute their own judgments for determinations made by State courts in shaping the duties and obligations of State Bar membership. Many prior decisions of this Court have recognized the importance of the State interest involved and have decreed that great deference is to be accorded to the State judicial determintions in the matter of defining and regulating the practice of law. See, e.g., *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975); *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 361 (1977); *District of Columbia Court of Appeals* v. *Feldman*, ___ U.S. ___, 103 S. Ct. 1303 at n. 16 (1983); *Middlesex County Ethics Committee* v. *Garden State Bar Association*, 102 S.Ct. 2515, 2522 at n. 11 (1982); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 248 (1957); *Leis* v. *Flynt*, 439 U.S. 438, 442 (1979); *Norfolk & Western R. Co.* v. *Beatty*, 423 U.S. 1009 (1975); *Wilson* v. *Wilson*, 430 U.S. 925 (1977).

However, in another line of decisions the Court has established general standard for review under the privileges and immunites clause which can be read as authorizing more intense judicial scrutiny of State enactments that appear to discriminate against nonresidents "seeking to ply their trade, practice their occupation, or pursue a common calling within the state." *Hicklin* v. *Orbeck*, 437 U.S. 518, 524 (1978). See also, *Toomer* v. *Witsell*, 334 U.S. 385 (1948). These two lines of decision must be authoritatively harmonized, where the residence requirement in question results from a State court's conclusion that residency at the time of bar admission is

necessary if lawyers are adequately to perform the obligations expected of them by the State court.

In this case, the United States District Court for the District of New Hampshire struck down the residency requirement adopted by the Supreme Court of New Hampshire. On appeal, the United States Court of Appeals at first reversed the District Court by a 2-1 decision, but then, following rehearing *en banc*, evenly divided 2-2. The result was to affirm the District Court's result, without any definitive appellate level determination in a matter of great concern and importance not only to the Supreme Court of New Hampshire but also to the highest courts of every other State which has chosen to require residency as a qualification for bar admission.

B. The District Court's Decision Should Not Be Permitted To Stand.

With respect to the District Court's determination, the appellant's position can be summarized as follows:

1. The District Court erred in striking down New Hampshire's simple residency requirement as violative of the privileges and immunities clause, because the District Court failed to consider whether the unique aspects of State control over the legal profession place that control outside the scope of the privileges and immunities clause and the exigent standard of review set forth in *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978). The District Court also failed to give adequate recognition to the United States Supreme Court's repeated injunction that policies adopted by a State's highest court in controlling the bar are to be accorded great deference.

While acknowledging that the privileges and immunities clause prohibits State regulation denying nonresidents equal opportunity in economic pursuits, proper

analysis must recognize that State control of the legal profession is not rooted in economic regulation. Rather, a State court's control over the bar is directed at governing those who uniquely and intimately participate in the exercise of judicial power of the State. Subjecting State control over lawyers to scrutiny under the privileges and immunities clause and the *Hicklin* standards would not promote the aims of the clause; rather, it would call into question and would subject to strict federal judicial scrutiny a State court's ability to control and establish standards for the conduct of those who daily participate in the exercise of a State's judicial power, any time such control might be said to affect residents and nonresidents differently.

Subjecting New Hampshire's simple residency requirement to such scrutiny fails to comply with the long-settled doctrine that the State courts, not lower federal courts, control the practice of law in the first instance, in light of the United States Supreme Court's recognition that since the founding of the Republic, licensing and regulation of lawyers, particularly with respect to State bar admissions, has been left exclusively to the States, and that the interests of the States in such control is especially great since lawyers are essential to the primary governmental function of administering justice. See, e.g., *Leis* v. *Flynt*, 439 U.S. 438, 442 (1979); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975).

2. The District Court erred in striking down New Hampshire's simply residency requirement because in subjecting the requirement to review under the privileges and immunities clause the District Court failed to undertake the proper balancing of interests required in *Hicklin* v. *Orbeck* and *Toomer* v. *Witsell*. Most importantly, the District Court failed to adjust the intensity of its judicial scrutiny in recognition of the importance of the State interest involved and the requisite degree of deference owed to the State court.

Again, such a proper balancing of interests must prominently recognize the United States Supreme Court's observations that regulation of the bar is at the core of the State's power to protect the public and that the State possesses an "extremely important interest" in maintaining the professional conduct of those it licenses. *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 361 (1977); *Middlesex County Ethics Committee* v. *Garden State Bar Ass'n.*, 102 S. Ct. 2515, 2522 at n. 11 (1982).

However, the District Co art did not adequately recognize the importance of the State's interest, nor did it accord appropriate deference to the New Hampshire Supreme Court's policy determination by moderating the intensity of its judicial scrutiny. Instead, the District Court in effect subjected New Hampshire's simple residency requirement to strict scrutiny under a "least restrictive alternative" analysis, an even higher standard of federal judicial intervention than is warranted by *Toomer* and *Hicklin*. Those cases, properly read, require only that there be a reasonable relationship between the dangers represented by non-residents as a class and the discrimination to which they are subjected. Moreover, *Toomer* specifically prescribes that in appropriate cases, considerable "leeway" must be given to the State in analyzing local evils and prescribing appropriate cures. 334 U.S. 385, 396. The amount of such leeway may vary, depending on the importance of the State interest involved.

Applying such a test of rationality while giving due "leeway" for the State's fundamental and extremely important interests in regulating the bar, means that the

New Hampshire Supreme Court is entitled to conclude that non-resident attorneys, once admitted, may be less likely to remain familiar with local rules and procedures and local conditions affecting their clients' interests; less likely to be subject to local peer pressure which imposes informal but powerful curbs on ethical or incompetent conduct through the regular practice of law in a relatively small and closely knit legal community; and less likely to be available for court appearances, disciplinary proceedings, mandatory practical skills courses and participation in New Hampshire's unified bar, as well as the *pro bono* and civic activities the New Hampshire Supreme Court expects of New Hampshire lawyers. All these concerns substantially relate to the New Hampshire Supreme Court's undoubted authority and primary interest in maintaining standards of ethical conduct and professional competence. These concerns also bear directly on the New Hampshire Supreme Court's determination to reduce the perceived risks presented by non-resident lawyers, by requiring residence at the time of admission to the bar.

Merely because New Hampshire's simple residency requirement does not go further and "defrock" lawyers who later leave New Hampshire does not deprive the requirement of its reasonable address to the problems perceived by the New Hampshire Supreme Court. The New Hampshire Court requires admittees to profess an intent to remain indefinitely and can reasonably expect that they will do so.

C. The Opinion Of The Court Of Appeals Which Would Have Reversed The District Court Appropriately Reflects Applicable Decisions Of This Court.

Regarding the First Circuit's treatment of the issues, the Court of Appeals, *en banc*, produced two Opinions,

each endorsed by two of the four active judges of the Circuit. The Opinion of Judge Bownes (the "Bownes Opinion") would have affirmed the District Court's decision, while the Opinion of Chief Judge Campbell (the "Campbell Opinion") would have reversed the District Court.

The Supreme Court of New Hampshire submits that the Campbell Opinion properly harmonizes this Court's previous decisions concerning the privileges and immunities clause, with this Court's decisions recognizing regulations of the bar as an area in which State courts are entitled to substantial federal deference. The Campbell Opinion properly held that the principles of federalism require giving greater weight than did the District Court to the right of each State to set bar standards, including bar residency standards (Campbell Opinion, App. p. 14a). Pointing to the special, historical relationship between the State's judiciary and those practicing before it, the Campbell Opinion suggested that to deprive a State's highest court of constitutional authority to impose a simple residence requirement would "modify the distribution of power under our federal system in a way not contemplated in precedents construing the privileges and immunities clause." (*Ibid.*, App., pp. 15a). According to the Campbell Opinion, those precedents required only a "substantial reason" for the discrimination against non-residents, i.e. that non-residency be a peculiar source of the evil at which the rule was aimed and there be a reasonable relationship between that danger and the discrimination, according reasonable leeway to States in analyzing local evils and prescribing appropriate cures.

The Campbell Opinion went on to agree that there are consequences that a State might reasonably regard as

harmful that could flow from a rule allowing those who would never live in New Hampshire to become full-fledged members of the New Hampshire bar. Reviewing this Court's decisions which recognize the State's important interest in regulating the bar and requiring substantial deference to be accorded to State court determinations in that area, the Campbell Opinion concluded that in this case, the law prohibits "substitution of our own judgment for that of the New Hampshire Supreme Court. . . ." Campbell Opinion, App. p. 18a).

1. **Repeated Decisions Of This Court Identify Control Of The Bar As A Very Important State Interest Entitled To Great Deference From The Federal Judiciary.**

The Campbell Opinion accurately recognized the strong, often repeated doctrine of this Court, stated in a variety of contexts and for a variety of reasons, that in matters of control over the practice of law, States pursue a very important interest and that such pursuit is entitled to great deference from the federal judiciary. Applying that mandate to the context of privileges and immunities analysis, the Campbell Opinion determined that due deference required non-inteference with New Hampshire's residency requirement where reasonable grounds could be adduced to support it. This is precisely the kind of "leeway" which, according to *Toomer*, is to be allowed to the State in appropriate cases.

Thus recognition and application of a strong, unmistakable line of this Court's decisions lies at the heart of the Campbell Opinion. Its conclusion, that control over admission to the State bar by the State's highest court is entitled to more federal deference than a parochial State attempt to limit access to economic benefit, is firmly rooted in precedents of this Court. The process followed by the Campbell Opinion is the only appropriate course

that gives effective application to this Court's decisions recognizing control over the bar as a "special" area. If as this Court has said, federal judges are required to give great deference to State court policy decisions in this area, federal judges cannot blithely apply exacting standards of judicial scrutiny and yet at the same time profess to have afforded the deference due.

For example, when a federal judge requires a state to demonstrate to his satisfaction that a particular policy is "closely tailored" to the problem it addresses, in fact the federal judge is according that policy no deference at all. Instead, he is requiring that he be persuaded to agree with the State policy's wisdom if that policy is to stand. On the contrary, if "deference" is to have any real meaning, it should not require the federal judiciary to agree with the wisdom of the result reached by the State. Rather, deference is accorded where, even if the federal judge does not concur in the substantive result, he nevertheless upholds that result if he can see some reasonable basis on which a properly motivated State court would have reached that result.

The central problem with the Bownes Opinion is that it does not give appropriate heed to decisions of this Court which identify state court bar control measures as matters of important state interest entitled to great federal deference. It is these decision that distinguish this case from privileges and immunities cases dealing with purely private, economic pursuits such as *Hicklin*, and it is these decisions which demand appropriate attention in reaching a conclusion in this case. The Bownes Opinion apparently gave no heed to these decisions, distinguishing them for a variety of reasons, but primarily because those decisions were not seen to bear directly on analysis under the privileges and immunities clause.

Moreover, the Bownes Opinion sought to avoid the thrust of this Court's decisions requiring special deference by setting up a straw-man "political function" test and then knocking it down with *In re Griffiths*, 413 U.S. 717 (1973). To be sure, *Griffiths* teaches that lawyers are not officials of government, nor formulators of government policy which would justify imposition of a requirement for U.S. nationality, under appropriate equal protection analysis. But that is all *Griffiths* teaches. It does not in the slightest diminish the force of this Court's decisions which identify State bar control as an area of very important State interest, nor does *Griffiths* relieve federal judges from according the deference those decisions require.

The Campbell Opinion carefully pointed out that its logic did not turn on a view that lawyers were officially capable of exercising judicial powers (Campbell Opinion App. p. 18-a) and so the Campbell Opinion did not depend on any mistaken attribution of "political function" to lawyers. Instead, as noted, the intellectual linchpin of the Campbell Opinion was its identification of a close relationship between *control* over a State bar and a State's primary governmental function of administering justice, drawn from an unbroken line of United States Supreme Court decisions identifying such control as a very important State interest, entitled to great federal deference.

2. No Governing Decision Of This Court Compels A Result Other Than The One Which Would Have Been Reached By The Campbell Opinion.

Again relying on *Griffiths*, the Bownes Opinion noted that upholding New Hampshire's residency requirement would "create the anomaly of a state being permitted to exclude nonresident citizens of the United States, but not

residents whose allegiance is to another country." (Bownes Opinion, p. 10, App. p. 8a-9a). However, merely because a State may not, consistent with equal protection, deny bar membership on the basis of nationality (a juridical concept with theoretical consequences) does not compel a conclusion that a State must be prohibited under the privileges and immunities clause from denying bar membership on the basis of residence (a physical concept with practical consequences).

Griffiths holds that a State may not, on the basis of nationality, discriminate against residents who seek admission to the State bar. The case dealt with the juridical concept of nationality, rather than the practical consequences of State residency. *Griffiths* simply did not address the issue posed in the present case, nor could it do so because the prohibition against discrimination on the basis of nationality cannot be derived from the privileges and immunities clause. *Zobel* v. *Williams*, 457 U.S. 55, 73 at n. 3 (1983) (O'Connor, J., concurring).

In the present case, New Hampshire Supreme Court Rule 42 is not concerned with the "citizenship" of an applicant in the sense that the term means "nationality" or the juridical concept of allegiance. What is of concern to the New Hampshire Supreme Court is the matter of physical residence, with its pragmatic consequences of presence, e.g., participation in and commitment to the administration of justice and the civic life of the State. Thus the issue in this case is not the concept of nationality but rather whether the highest court of a State may prescribe a practical admission requirement which it believes to be essential to the exercise of its constitutional responsibilities within State government. There is no question that the power to "define and regulate" the practice of law "naturally and logically belongs to the

[state] judicial department" precisely because the practice of law "is so directly connected and bound up with the exercise of judicial power and the administration of justice." *Middlesex Ethics Committee* v. *Garden State Bar Association*, 102 S. Ct. 2515, 2522, at n. 11.

Nothing in *Griffiths* or any other case cited by the Bownes Opinion prohibits the New Hampshire Supreme Court from defining the obligations of members of the New Hampshire Bar. In effect, the New Hampshire Supreme Court has determined that lawyer "competence" involves something more than mere learning in the law, but also may require continuing legal education, participation in bar activities, volunteer service, civic activities, local peer pressure and the like. The New Hampshire Supreme Court has determined that its simple residency requirement is necessary to enhance the likelihood that those obligations would be met by New Hampshire lawyers. No decision of this Court prohibits the New Hampshire Supreme Court from drawing such a conclusion or requires this Court to reject that conclusion. Instead, as the Campbell Opinion recognized, such determinations by a State's highest courts have usually been granted substantial deference by the federal courts (Campbell Opinion, App. p. 19-a).

D. CONCLUSION

The Bownes Opinion and the result reached by the District Court essentially conclude that the privileges and immunities clause mandates the establishment of a national bar as a matter of federal constitutional law. No controlling decision of this Court mandates such a result and *Bradwell* v. *Illinois*, 83 U.S. (16 Wall) 130, (1873) establishes that the right to control and regulate admission to the practice of law in the courts of a state is one of

those powers which has not been transferred for its protection to the federal government. Accordingly, the result reached by the District Court, as approved in the Bownes Opinion, should not be permitted to stand.

For the reasons stated, the Supreme Court of New Hampshire urges this Court to note probable jurisdiction and to schedule this case for plenary consideration by the Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1548

KATHRYN A. PIPER,
Plaintiff-Appellee,

v.

SUPREME COURT OF NEW HAMPSHIRE,
Defendant-Appellant.

Appeal From The United States District Court For The District Of Massachusetts

[Hon. Martin F. Loughlin, *U.S. District Judge*]
[539 F. Supp. 1064 (1982)]

Before
Campbell, *Chief Judge*,
Coffin, Bownes and Breyer, *Circuit Judges*.

Martin L. Gross, *Sulloway, Hollis & Soden*, *Martha V. Gordon*, *Devine, Millimet, Stahl and Branch*, and *Gregory H. Smith*, Attorney General, on supplemental brief for appellant.

Robert A. Backus, and *Backus, Shea & Meyer* on supplemental brief for appellee.

December 5, 1983

OPINIONS EN BANC

Per Curiam. In this challenge to the constitutionality of Rule 42 of the Supreme Court of New Hampshire, the district court found that the rule violated the privileges and immuni-

ties clause. 539 F. Supp. 1064 (D.N.H. 1982). A divided panel of this court reversed. Upon granting the petition for rehearing en banc, this court vacated the panel's judgment and withdrew the panel opinion. Upon en banc reconsideration this court is now divided 2-2. Therefore, the decision of the district court is affirmed by an equally divided vote.

We reproduce below the two en banc opinions.

BOWNES and COFFIN, *Circuit Judges*. The issue in this en banc appeal is whether Rule 42 of the New Hampshire Supreme Court, requiring that applicants to the state bar establish New Hampshire residency, violates the privileges and immunities clause in article IV, § 2 of the United States Constitution.

The facts may be briefly summarized. Plaintiff-appellee Kathryn Piper lives in Lower Waterford, Vermont, within 400 yards of the New Hampshire border. In 1979, she applied for permission to sit for the February 1980 New Hampshire bar examination, and signed a statement of intent to establish residency in New Hampshire as required by Rule 42. The rule provides that a bar applicant must "either [be] a resident of the State of New Hampshire or [have] filed a statement of intention to reside in the State of New Hampshire." This is interpreted to mean that bar applicants must establish bona fide residency at the time the oath or admission is administered.[1] *See Piper* v. *Supreme Court of New Hampshire*, 539 F. Supp. 1064, 1066 (D.N.H. 1982). Piper received permission to take the examination, did so, and was informed on April 18, 1980, that she had passed it and would become eligible for admission to the state bar upon establishing New Hampshire residency. Piper then requested a dispensation from the residency

[1] Under New Hampshire law, residency consists of a domicile or place of abode within the State and a political subdivision thereof, as well as a "current intent to designate that place of abode as [the] principal place of physical presence for the indefinite future to the exclusion of all others." N.H. Rev. Stat. Ann. ch. 21 § 6.

requirement on grounds of changed personal circumstances involving the recent birth of a child. The New Hampshire Supreme Court denied her petition on December 31, 1980.

On March 22, 1982, Piper filed a complaint in the United States District Court for the District of New Hampshire alleging that the residency requirement violated various provisions of the United States Constitution including the privileges and immunities clause of article IV, § 2. The district court held that Rule 42 violated the privileges and immunities clause. *See Piper, supra*. After the first hearing of this appeal, a panel of the court, with one judge dissenting, reversed the district court and upheld the challenged rule. *Piper* v. *Supreme Court of New Hampshire*, 708 F.2d 825 (1st Cir. 1983). Having reheard the appeal en banc, the court stands evenly divided, and the district court's judgment is reinstated.

The United States Constitution, art. IV, § 2, provides: "The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States." The purpose of this clause is not to create an open-ended category of privileges and immunities incident to national citizenship, but rather to guarantee that each state shall afford the same privileges and immunities to noncitizens or nonresidents as it does to its own citizens or residents.[2] "The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own." *Hague* v. *Committee for Ind'ustrial Organization*, 307 U.S. 496, 511 (1939), *cited in Baldwin* v. *Montana Fish & Game Comm'n*, 436 U.S. 371, 381-82 (1978); *see also id.* at 380-81, citing *Paul* v. *Virginia*, 75 U.S. 168, 180 (1869).

In interpreting the privileges and immunities clause, the Supreme Court has not yet defined the precise contours of the interests protected by the clause. In *Baldwin*, however, the Court noted that the clause "has been interpreted to prevent a

[2] It is settled that for purposes of the privileges and immunities clause the terms "citizen" and "resident" are interchangeable. *See Hicklin* v. *Orbeck*, 437 U.S. 518, 524 n.8. (1978).

State from imposing unreasonable burdens on citizens of other States in their pursuit of common callings within the State; in the ownership and disposition of privately held property within the State; and in access to the courts of the State." 436 U.S. at 383 (citations omitted). The Court proceeded to explain that the clause applies "to basic and essential activities, interference with which would frustrate the purpose of the formation of the Union." *Id.* at 387. Among those protected interests, the Court clearly counted the individual's "right to pursue a livelihood in a State other than his own, a right that is protected by the Privileges and Immunities Clause. *Toomer v. Witsell*, 334 U.S. 385 (1948)." 436 U.S. at 396.

In *Baldwin*, the Court rejected a challenge to a state scheme which imposed more expensive and burdensome conditions for obtaining elk hunting licenses on nonresidents than on residents; elk hunting was characterized as "a recreation and a sport" rather than "a means to the nonresident's livelihood." *Id.* at 388. When dealing with residency-based discrimination that affects economic or occupational opportunities, though, the court has consistently struck down state barriers. In *Toomer*, the Court invalidated a state statute which required nonresident shrimpers to pay a licensing fee one hundred times higher than that for residents. The articulated function of the privileges and immunities clause was "to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. . . . [O]ne of the privileges which the clause guarantees to citizens of State A is that of doing business with State B on terms of substantial equality with the citizens of that State." 334 U.S. at 395-96. Most recently, in *Hicklin v. Orbeck*, 437 U.S. 518 (1978), the Court held that a state statute requiring preferential hiring for state residents in the oil and gas industry constituted "discrimination against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling with in the State," and thus violated the privileges and immunities clause. The Court reaffirmed that "a resident of one State is constitutionally entitled to travel to another State for purposes of employment free

from discriminatory restrictions in favor of state residents imposed by the other State." *Id.* at 524-25.

The *Hicklin* Court also perceived a "mutually reinforcing relationship" between the privileges and immunities clause and the commerce clause, stemming from their "common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism," *id.* at 531-32, and cited several commerce clause decisions to support the privileges and immunities reasoning.[*] The two clauses are indeed similar, for both limit a state's ability to afford its own residents preferential treatment at the expense of nonresidents. Analysis under either clause may lead to the same result in a given case. Nevertheless, the application and effect of the clauses are distinct. The commerce clause serves to prevent the states from interfering with regulation of interstate commerce by the federal legislature, while the privileges and immunities clause guarantees individual rights: the distinction between the prerogatives of Congress and the rights of private citizens is important. The application of the commerce clause depends on the expressed intent of Congress, which could conceivably endorse various state statutes having distorting effects on interstate commerce. By contrast, nothing within the power of Congress can abrogate the guarantees of the privileges and immunities clause. Analysis under that clause must be carried out independently.

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[*] The *Hicklin* Court cited three cases in which the Supreme Court, relying on the commerce clause, invalidated state attempts to limit use of in-state resources to state residents. In *West v. Kansas Natural Gas*, 221 U.S. 229 (1911), the Court held that Oklahoma's prohibition on out-of-state shipment of in-state natural gas violated the commerce clause; in *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), the Court held that West Virginia's requirement that natural gas companies give preference to state residents violated the commerce clause; and in *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928), the Court held that the commerce clause prohibited Louisiana from requiring in-state processing of indigenous shrimp as a prerequisite to shipment out of state.

Chief Judge Campbell invokes National League of Cities v. *Usery*, 426 U.S. 833 (1976), and its progeny apparently to suggest that, like congressional power to legislate under the commerce clause, the reach of the privileges and immunities clause should be limited to areas closely tied to the state's ability to function as a sovereign government. [Cite to Campbell/Breyer en banc opinion.] But, although the commerce clause and the privileges and immunities clause have the common constitutional purpose of promoting national unity, it is misleading to suggest that analysis under the two clauses is identical. Whether Congress could, under its commerce power, enact a statute that required states to admit nonresidents who otherwise met a state's bar qualifications is not the question before this court.

National League of Cities found in the tenth amendment a prohibition on congressional interference under the commerce clause with matters deemed essential to the sovereignty of a state. But the tenth amendment reserves to the states only those powers not prohibited to the states by other provisions of the Constitution. Article IV, section 2 is such a provision, removing from the states the power to deny noncitizens or nonresidents those privileges and immunities that it extends to its own citizens and residents.

Under a privileges and immunities analysis, a state is not absolutely prohibited from establishing residency qualifications; certain activities closely related to a state's preservation of its sovereign identity are permitted under the clause. The Supreme Court in *Baldwin* offered the examples of voting and qualification for elective office:

> Suffrage, for example, always has been understood to be tied to an individual's identification with a particular State. See, *e.g.*, *Dunn* v. *Blumstein*, 405 U.S. 330 (1972). No one would suggest that the Privileges and Immunities Clause requires a State to open its polls to a person who declines to assert that the State is the only one where he claims a right to vote. The same is true as to qualification for an elective office of the State. *Konigsberg* v. *Ellisor*, 419 U.S. 891 (1974); *Chimento* v. *Stark*, 353 F. Supp. 1211 (NH), *summarily aff'd* 414 U.S. 802 (1973).

436 U.S. at 383. The Court did not go on to define the extent of the sovereign identity exception to the privileges and immunities clause, but the citation to *Dunn* v. *Blumstein* suggests that guidance mau be found in a line of equal protection decisions concerning citizenship requirements. In *Sugarman* v. *Dougall*, 413 U.S. 634 (1973), the Court invalidated a state requirement that all employees in the classified civil service be United States citizens. The Court recognized that states have an "interest in establishing [their] own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community,' " *id.* at 642 (quoting *Dunn*, 405 U.S. at 344), but found that the state's interest in preserving its separate, sovereign identity did not extend to all public employment. Instead, the Court articulated a general standard, explaining that the state could legitimately specify citizenship as a prerequisite

> not only [for] the qualifications of voters, but also [for] persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formation, execution, or review of broad public policy perform functions that go to the heart of representative government.

413 U.S. at 647.

Following *Sugarman*, the Court has applied the sovereign identity standard in several equal protection challenges to citizenship requirements. Within the limited area of occupations directly affecting state soverignty interests, the Court has upheld citizenship requirements. *See, e.g., Cabell* v. *Chavez-Salido*, 454 U.S 432 (1982) (probation officers); *Ambach* v. *Norwick*, 441 U.S. 68 (1979) (public school teachers); *Foley* v. *Connelie*, 435 U.S. 291 (1978) (police officers).

Outside of that area, however, the court has applied the *Sugarman* standard to strike down citizenship requirements. *See, e.g., Examining Bd.* v. *Flores de Otero*, 426 U.S. 572

(1976) (civil engineers); *In re Griffiths*, 413 U.S. 717 (1973) (lawyers). The decision in *Griffiths* is especially helpful in the present case because it explains why lawyers, though loosely called "officers of the courts," do not fall within the range of occupations on which states may impose a citizenship requirement:

> "Certainly nothing that was said . . . in any other case decided by this Court places attorneys in the same category as marshals, bailiffs, court clerks or judges. Unlike these officials a lawyer is engaged in a private profession, important though it be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business. The word 'officer' as it has always been applied to lawyers conveys quite a different meaning from the word 'officer' as applied to people serving as officers within the conventional meaning of that term."

413 U.S. at 728-29 (quoting *Cammer* v. *United States*, 350 U.S. 399, 405 (1956). The Court proceeded to distinguish the bar as a profession from the political occupations that might properly be reserved for citizens:

> Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts. . . . Yet, they are not officials of government by virtue of being lawyers. Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy.

Id. at 729 (footnote omitted). The *Griffiths* holding places the practice of law as such squarely outside of the range of occupations implicating state sovereignty, and leads to scrutiny of residency requirements for state bar admission on the same terms as similar requirements for any other commercial or professional livelihood.[4] *See Stalland* v. *South Dakota Bd. of*

[4] The proportion of lawyers who engage in litigation is small compared to the number whose practice is devoted to the commercial aspects of modern life. As a practical matter, the activities of many, if not most, bar members are essentially commercial. It may also be noted in passing that if the New Hampshire bar residency requirement were upheld, it would, taken together with *Griffiths*, create the anomaly of a state being permitted to exclude nonresident citizens of the United States but not residents whose allegiance to another country.

Bar Examiners, 530 F. Supp. 155, 158 (D.S.D. 1982); Note, *A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV*, 92 Harv. L. Rev. 1461, 1468-79 (1979).

The proper standard for evaluating the privileges and immunities claim in this case is set out in *Hicklin*.[5] In order to justify its bar residency requirement, appellant must show first that nonresident members of the state bar would "constitute a peculiar source of the evil at which the [rule] is aimed,"

[5] The cases holding that members of one state's bar have no constitutional due process right to argue *pro hac vice* before the courts of another state do not affect the applicability of *Hicklin* in the privileges and immunities context. *Leis* v. *Flynt*, 439 U.S. 438 (1979), dealt exclusively with a procedural due process claim, and held that no underlying substantive right under state or federal law was denied by the exclusion from the case of lawyers who had not qualified for the state's own bar. This distinction concerned members of the Ohio bar and nonmembers, not resident applicants for that bar and nonresidents. Likewise, in *Norfolk and Western Railway Co.* v. *Beatty*, 409 F. Supp. 234 (S.D. Ill.), *summarily aff'd*, 423 U.S. 1009 (1975), the district court simply found that a state rule granting the presiding court discretion as to whether to permit out-of-state counsel to appear in individual cases was not unconstitutional; no requirements for admission to the state bar were at issue, and no specific basis for the constitutional claim was mentioned.

Nor is the issue in this case foreclosed by *Wilson* v. *Wilson*, 416 F. Supp. 984 (D. Ore. 1976), *summarily aff'd*, 430 U.S. 925 (1977). The district court in *Wilson* was faced with a challenge to a state bar residency requirement, but the privileges and immunities clause was not advanced as a basis for the constitutional claim. In reaching its decision, the district court considered only equal protection, due process, and right-to-travel grounds. The Supreme Court's summary

437 U.S. at 526 (quoting *Toomer*, 334 U.S. at 396), and further that the challenged rule's discrimination "bear[s] a substantial relationship to the particular 'evil' [that nonresidents] are said to present." 437 U.S. at 527; *cf. Baldwin*, 436 U.S. 402 (Brennan, J., dissenting) (test is whether "the presence or activity of nonresidents is the source or cause of the problem or effect with which the State seeks to deal," and whether "the discrimination practiced against nonresidents bears a substantial relationship to the problem they present").

"It is undisputed that a State has a constitutionally permissible and substantial interest in determining whether an applicant [to the state bar] possesses 'the character and general fitness requisite for an attorney and counselor-at-law.' " *Griffiths*, 413 U.S. at 722-23 (citations omitted). The evils against which New Hampshire's residency requirement is purportedly directed do relate to the state's interest in regulating the character and general fitness of bar applicants; the inquiry under the privileges and immunities clause, however, is directed at whether those evils are categorically traceable to nonresidents. Appellant contends that nonresidents pose a peculiar threat to the quality of the state bar because (a) they are ignorant of local practice and rules, (b) they have less incentive for developing a good reputation within the state, and (c) they are difficult to reach in connection with court proceedings and disciplinary action.

There is no reason to suppose that nonresidents who have studied the same materials and passed the same examination as residents should have an *inferior* command of local practice and rules. It would seem instead that *any* newly qualifying

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affirmance has limited precedential value, and can be taken only to affirm the precise issues decided by the court below. *See Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 182-83 (1979); *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977). Furthermore, the Supreme Court's subsequent decision in *Hicklin* drastically undermines whatever persuasive value *Wilson* might have had with respect to a privileges and immunities claim.

lawyer would, at the outset of his activities, be hampered by lack of experience with the intricacies of state practice and procedure. *See Stalland*, 530 F. Supp. at 159-60.

As for the alleged lack of incentive to develop a good reputation, it is difficult to perceive "the relevance of citizenship to any likelihood that a lawyer will fail to protect faithfully the interest of his clients." *Griffiths*, 413 U.S. at 724. Professional integrity, desirable and essential as it is, cannot logically be linked with a lawyer's state of residence. Moreover, a lawyer's reputation is properly viewed as a private concern; the legal competence and ethical fitness in which the state has an interest cannot be said to depend on "cultural provincialism." *Keenan* v. *Board of Law Exam'rs*, 317 F. Supp. 1350, 1359 (E.D.N.C. 1970).

Likewise, the problem of unavailability for court or disciplinary proceedings is not peculiar to nonresidents. Many nonresidents who live in neighboring states are located closer to New Hampshire courts than residents of outlying parts of the state. There is no ground to assume that aspirants to the bar of a given state would remain so far away for the distance to make practice especially inconvenient. Furthermore, New Hampshire's long-arm statute makes disciplinary proceedings against nonresidents no more burdensome than against residents.[6]

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[6] Our brethren acknowledge that the unarticulated purpose and likely effect of New Hampshire's residency requirement may consist of mere local protectionism, and they do not purport to justify this as a legitimate basis for the rule. Nor do they rely on the reasons advanced by the New Hampshire Supreme Court as constituting the "substantial reason" required under *Hicklin*. They suggest that without a protective residency requirement, a state bar would be vulnerable to domination by out-of-state law firms which would drain the most attractive legal work away from in-state lawyers and undermine the quality and extent of legal services in the state. This argument strikes us as unduly speculative and somewhat circular. We see no reason to assume that nonresident lawyers are somehow

The second limb of the *Hicklin* test requires a showing that the discriminatory rule bears a *substantial* relationship to the perceived evils, and here again the New Hampshire rule cannot be upheld. The blanket exclusion of nonresidents may serve to protect the state market for legal services from outside competition, but it does not serve the stated purposes. The purported evils against which the rule is supposedly aimed bear no particular connection with the presence of nonresidents in the state bar. It should be observed as well that New Hampshire's rule does not require continuing residency, but only residency at the time of admission to the bar, combined with intent to remain. This permits bar members to leave the state after admission without forfeiting their membership, and belies the state's asserted justifications for the rule.

Indeed, far less burdensome means are available to achieve the state's legitimate ends. To ensure a basic knowledge of local practice and rules, the state may and does impose continuing legal education requirements. Similarly, standards may be set for courtroom decorum, professional conduct and trial practice, to be enforced by presiding judges and disciplinary committees. To facilitate availability for court, the state might require that nonresidents maintain an office or affiliate themselves with lawyers within the state. *See Stalland*, 530 F. Supp. at 160-61. The Supreme Court addressed the same concerns in *Griffiths*:

> [The state] has wide freedom to gauge on a case-by-case basis the fitness of an applicant to practice law. [It] can, and does, require appropriate training and familiarity with [state] law. Apart from such tests of competence, it requires a new lawyer to take both an "attorney's oath" to perform his functions faithfully and honestly and a "commissioner's oath" to "support the constitution of the United States, and the constitution of [the state]." . . . [The state] may quite properly conduct a character investigation to insure in any given case "that an applicant is not one who 'swears to an oath pro forma while declaring or manifesting his disagreement with or indifference to the oath.'" Moreover, once admitted to the bar, lawyers are subject to continuing scrutiny by the organized bar and the courts. In addition to discipline for unprofessional conduct, the range of post-admission sanctions extends from judgments for contempt to criminal prosecutions and disbarment. In sum, the [bar committee] simply has not established that it must exclude all aliens from the practice of law in order to vindicate its undoubted interest in high professional standards.

413 U.S. at 726-27 (citations omitted).

A number of states have recently abandoned their own bar residency requirements. *See, e.g., Stalland*, 530 F. Supp. 155 (D.S.D. 1982); *Noll* v. *Alaska Bar Ass'n*, 649 P.2d 241 (Alaska 1982); *Sorgus* v. *West Virginia Bd. of Law Examiners*, 294 S.E.2d 440 (W.Va. 1982); *Strauss* v. *Alabama State Bar*, 520 F. Supp. 173 (N.D. Ala. 1981); *Shelley* v. *Alaska Bar Ass'n*, 620 P.2d 640 (Alaska 1980); *Gordon* v. *Commission on Character & Fitness*, 397 N.E.2d 1309 (N.Y. 1979). Whether these cases reflect the aftermath of the Supreme Court's "revitalization" of the privileges and immunities clause in *Baldwin* and *Hicklin*, *see generally Note*, 92 Harv. L. Rev. 1461, or the growth of nationwide law practice and law firms, the trend toward in-house counsel for national and multinational corporations, and the emergence of specialized fields extending across state lines,[7] they do show at the very least that other states have not

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better than residents and would, therefore, drain local practice away from native lawyers. And, if certain types of legal business call for the specialized expertise of large firms located in other states, we see no reason why that business should not be performed by the most competent lawyer available, whether that lawyer happens to reside within or without the boundaries of a given state. Our brethren's conclusion that the residency requirement is reasonable "[i]f there is a substantial reason for favoring residents over nonresidents here" merely begs the question of whether residency bears a rational relationship to competence.

[7] A sample of these burgeoning specialities would include: computer (and other high technology) law, environmental law, mergers and acquisitions, federal securities, federal tax, interstate banking, pat-

The legal profession has a special relationship, grounded in the history of our nation, with the judicial branch of the state by and before which a particular lawyer is licensed to practice law. To hold that henceforth the highest court of the state lacks constitutional power to enact requirements like those embodied in New Hampshire Supreme Court Rule 42 would modify the distribution of power under our federal system in a way not contemplated in precedents construing the privileges and immunities clause.

The privileges and immunities clause of article IV of the Constitution provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The clause, placed alongside the commerce clause in the Constitution, was designed to serve the essential role of fusing the several states into one nation and to preserve the "structural balance essential to the concept of federalism." *Austin* v. *New Hampshire*, 420 U.S. 656, 662 (1975). *See Toomer* v. *Witsell*, 334 U.S. 385, 396 (1948). Towards this end, the Supreme Court has held violative of the clause "state discrimination against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State." *Hicklin* v. *Orbeck*, 437 U.S. 518, 524 (1978). In *Hicklin* the Court struck down a state law favoring qualified Alaska residents over nonresidents for jobs on the Alaska pipeline. The Court looked to whether there was a "substantial reason" for the discrimination against nonresidents. Were they the "peculiar source" of the evil at which the statute was aimed? And, was there a " 'reasonable relationship between the danger represented by non-residents, as a class, and the . . . discrimination.' " *Id.* at 525-26 (quoting *Toomer* v. *Witsell*, 334 U.S. at 398-99) (emphasis added). In our reference to

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al courts have jurisdiction to hear generalized constitutional challenges to state bar rules. Piper's challenge is generalized. She does not question that Rule 42 applies in her case, but rather contends that such a residency requirement is unconstitutional in all cases.

found residency requirements necessary for effective regulation of state bars. To permit states to impose residency requirements unrelated to a legitimate interest in the quality of bar applicants would not only violate the privileges and immunities clause, but also pave the way for more burdensome and arbitrary requirements.[6]

Because New Hampshire has not advanced valid reasons for discriminating against nonresidents with respect to bar admissions, and because its rule bears no substantial relation to its stated purposes, we would hold the rule unconstitutional, and affirm the judgment of the district court.

Judge Coffin concurs fully in this opinion.

CAMPBELL, *Chief Judge*, and BREYER, *Circuit Judge*. The facts are adequately stated in Judge Bownes' opinion, and we need not repeat them here. Unlike our brethren, we believe that New Hampshire's bar residency requirement is constitutional.

The major difference between us and our brethren arises out of our belief that principles of federalism require giving greater weight than did the district court to the right of each state court to set bar standards, including bar residency standards.[1]

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ents and trademarks, products liability, mass disaster litigation, bankruptcy, labor law, and the Uniform Commercial Code.

[6] It is only a short step from a residency requirement for a state to impose obligations of *pro bono* work, public lecturing, or continuing education. Although such requirements may be perfectly legitimate in moderation, they could conceivably amount to an unreasonable burden. The issue need not be decided here.

[1] After oral argument was heard by the panel, the Supreme Court decided *District of Columbia Court of Appeals* v. *Feldman*, 51 U.S.L.W. 4286 (Mar. 23, 1983). Appellant has suggested to us that *Feldman* requires the dismissal of the instant case for lack of jurisdiction. We disagree. *Feldman* holds that a federal district court may not sit in review of a state court's application of a bar requirement to a particular individual's case. *Feldman* indicates, however, that federal

Hicklin, we emphasize the word "class" to deflect attention from this particular plaintiff, who lives in Vermont just across the river from New Hampshire and whose admission would likely cause little trouble. Rather, the issue is whether there are good reasons that might justify New Hampshire saying to the "class" of potential applicants for the state bar who have never (as lawyers) resided in New Hampshire that they cannot practice law there. We also emphasize the word "reasonable" because it tells us that we need not hold the state to some highly stringent standard of proof. Rather, the word "reasonable" is meant to remind us that our assessment of state practices under the privileges and immunities clause is to "be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures." *Toomer* v. *Witsell*, 334 U.S. at 396. The rights of specifically protected minorities are not at stake here.

We recognize at the outset that New Hampshire's rule may serve the less than commendable purpose of insulating New Hampshire practitioners from out-of-state competition. It may discourage those with New Hampshire legal problems from choosing lawyers residing outside New Hampshire to represent them for two reasons. First, a nonresident lawyer who is fully familiar with New Hampshire law cannot explain this latter fact to the client by pointing to bar membership. Second, the nonresident lawyer may have to pay a fee to a New Hampshire bar member to associate the bar member with the case, should a court appearance prove necessary. Were there no more to this case than local "protectionism" that would raise the cost of New Hampshire legal services, we would likely agree with our brethren. *See Hicklin* v. *Orbeck*, 437 U.S. at 523-24 (citing *Austin* v. *New Hampshire*, 420 U.S. at 660, and *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869)). But, our problem arises out of the fact that we see other possible purposes and consequences at stake.

It seems to us that there are circumstances that a state might reasonably regard as harmful that could flow from a rule

allowing those who would never live in New Hampshire, not only to appear in New Hampshire courts (which they can do anyway, *pro hac vice* without bar membership) but also become full-fledged members of the New Hampshire bar, holding themselves out as maintaining an active law practice there. The state might reasonably fear that complete abolition of residency requirements would mean large law firms in distant states would exert significant influence upon the decisions, practices, and makeup of the New Hampshire bar. The 200-member New York City or Los Angeles firm might simply qualify one or two of their number for New Hampshire practice, dispatching them from their homes in Upper Manhattan or Santa Monica as necessary to handle New Hampshire litigation. Certainly, the trends toward nationwide and specialized practice that Judge Bownes mentions suggest that this possibility is more than idle fancy. If so, law practice, at least in certain fields, could come to be dominated by out-of-state lawyers whose only connection with the state would be their desire to earn money there. And, the New Hampshire Supreme Court might well hesitate to authorize change in the composition of its bar that could allow these nonresidents a dominant voice in the bar's decisions.

For one thing, a shift of a large portion of the state's legal work to lawyers in distant states could undermine the quality and extent of the bar's voluntary public service contributions and also limit the legal services available to state residents without ready access to distant firms. The "public service" work that lawyers perform often depends upon what their peers expect of them; bench and bar simply cannot reasonably expect as great a local contribution from those who live in distant places; and a bar with a significant out-of-state component may well "expect" less of itself. Likewise, the state can reasonably be concerned that its local citizens—the intended beneficiaries of the state's legal order—should not have to travel to unknown firms in distant cities to obtain the services of the state's bar. That is to say, it may seem reasonable to the state that some clients using out-of-state lawyers pay slightly

more in order to maintain more available and affordable legal services for those citizens who must remain within the state.

For another thing, lawyers whose practice and peers are located elsewhere may tend to be less familiar with local nuance and custom. The presence of a significant out-of-state segment will tend to assimilate New Hampshire law to the law of other states. And, to the extent that differences of nuance reflect different local needs or conditions, New Hampshire's citizens will be the losers.

Finally, there is something to be said for personal familiarity with a community or region as a touchstone of one's understanding of local customs, needs, and expectations—an understanding of which makes up one significant part of the practitioner's art. To pretend that one can measure this aspect of legal skill through tests or teach it through legal education courses is to have an overabundance of faith in the academy.

The issue here as we see it is not whether a residency requirement is desirable; many states have decided it is not. Nor is the issue whether the "good" reasons for it outweigh the "bad"; that is primarily a matter for the New Hampshire Supreme Court. Rather, the question is whether we can set aside that court's determination; or whether the presence of those potentially justifying reasons provide the state with *Hicklin*'s "substantial reason" for discriminating against nonresidents. Obviously, the issue is difficult. But we conclude that the law prohibits the substitution of our own judgment for that of the New Hampshire Supreme Court for several reasons.

First, there is a special connection, recognized in law, between bar membership and a state's governmental function. The bar is part of the judiciary which, together with the executive and legislative branches, is the state government. Lawyers, as "officers of the court," are not officials capable of exercising judicial powers, *see In re Griffiths*, 413 U.S. 717, 729-29 (1973); *Connor* v. *United States*, 350 U.S. 399 (1956), but they are closely associated with, and have important responsibilities within the court system. Indeed, competent and

responsibilities within the court system. Indeed, competent and dedicated lawyers make the state's judicial system work. The Supreme Court has recognized this "special connection" when holding that a state's interest in regulating lawyers is "especially great since lawyers are essential to the primary governmental function of administering justice. . . ." *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975). *See also Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). Accordingly, state bar regulations have usually been granted substantial deference by the federal courts. *See District of Columbia Court of Appeals* v. *Feldman*, 51 U.S.L.W. at 5291 n.16; *Middlesex County Ethics Committee* v. *Garden State Bar Association*, 50 U.S.L.W. 4712, 4715 (June 21, 1982) (Brennan, J., concurring).[1]

Second, as we have previously mentioned, *Toomer* v. *Witsell* laid down the "principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures." 334 U.S. at 396. *Hicklin*, of course, relied on *Toomer* and stipulated that the state must come forward with "something to indicate" that nonresidents pose a special danger. 437 U.S. at 525 (quoting *Toomer*, 334 U.S. at 398). This language suggests that deference to the state's views is appropriate. We see no reason to depart from that view here.

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[1] Of course, a state cannot regulate its bar in such a way as to deny an applicant freedom of speech, *see Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957), or equal protection of the laws. *See In re Griffith*, 413 U.S. 717. But, even when a court reviews a first amendment attack upon a state bar regulation, a federal court must be mindful that "Admission to practice in a State and before its courts necessarily belongs to that State." *Schware*, 353 U.S. at 249 (Frankfurter, J., concurring). *Cf. Middlesex County Ethics Committee* v. *Garden State Bar Association*, 50 U.S.L.W. 4712 (federal court should abstain from hearing first amendment challenge to a pending state ethics committee proceeding).

where the commercial activity involved is not *purely* private,[*] but instead a state's highest court is deciding the qualifications of those whose relation to the state's governmental function has been described (by the Supreme Court) as "special." "Deference," of course, includes upholding a view that a federal court may consider wrong, for otherwise that notion and the related power of the state to act within its constitutionally granted sphere of autonomy, would have little meaning.

Third, the Supreme Court's recent decision in *Leis* v. *Flynt*, 439 U.S. 438 (1979) (*per curiam*), supports this view. In that case two out-of-state attorneys challenged an Ohio court's refusal to grant them a hearing on their applications to appear *pro hac vice*. Although the Court did not face the precise issue now before us, its analysis shows that states are to be given considerable deference in regulating the practice of law in their state by nonresident attorneys. The Court found that the

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[*] Figure cites *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), and *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), for the argument that the practice of law is merely a form of private commercial activity. We do not believe that these cases stand for any such proposition. In *Goldfarb* the Supreme Court held that a minimum fee arrangement established by a *voluntary bar association* violated the Sherman Act, 15 U.S.C. § 1. The Court's opinion made clear that it "intend[ed] no diminution of the authority of the State to regulate its professions." 421 U.S. at 793. In *Bates* the Court held that a total ban on price advertising by attorneys violated the first amendment. The Court there emphasized the narrowness of its holding, a point which was made clear in *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447 (1978), which held that states can ban in-person solicitation by lawyers seeking clients for profit. Cases arising under the first amendment appear to provide little guidance on how the privileges and immunities clause should be applied to state bar regulations. The first amendment has long been applied to bar regulations. *See, e.g., Schware* v. *Board of Bar Examiners*, 353 U.S. 232, and the unique problem in privileges and immunities clause cases of balancing state sovereignty with national unity is not presented in the first amendment area.

out-of-state attorneys had no federally protected right to practice law in another state. The Court stated that "Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct." *Id.* at 442. The Court further stated that a Second Circuit case, *Sopinos* v. *Skouras Theatres Corp.*, 364 F.2d 161 (2d Cir.) (en banc), *cert. denied*, 385 U.S. 987 (1966), which had found a New York *pro hac vice* regulation violative of the privileges and immunities clause was "limited if not rejected entirely" by *Norfolk & Western R. Co* v. *Beatty*, 423 U.S. 1009 (mem.), *aff'g* 400 F. Supp. 234 (S.D. Ill. 1975), a case rejecting a constitutional challenge to the Illinois *pro hac vice* rule. *Leis* v. *Flynt*, 439 U.S. at 442 n.4. This case clearly demonstrates that a very special kind of deference is due a state's regulation of law practice by those within and without its borders—and that a state's power includes placing major restrictions on out-of-state practitioners' access to its courts.

Fourth, we are judging a matter of professional qualifications under the privileges and immunities clause, art. IV, § 2, cl. 1, a question with a less direct impact on the national "common market" than cases arising under the commerce clause, art. I, § 8, cl. 3, such as *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963). The New Hampshire body that made this decision was not the legislature, arguably directly responsive to in-state (but not out-of-state) political demands for economic protection; rather, it was the New Hampshire Supreme Court, insulated by the New Hampshire Constitution, pt. II, art. 73, from the direct political demands of the electorate. *Cf.* Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425, 427-28 (1982) (urging process-oriented interpretation of the privileges and immunities clause).

For these reasons, we believe that the federal courts are to give meaningful "leeway," *Toomer* v. *Witsell*, 334 U.S. at 396,

to the New Hampshire judgment. We do not then see how a federal court can say that the New Hampshire court's fear of some adverse consequences from admitting the class of wholly out-of-state lawyers as full-fledged members of the New Hampshire bar is insubstantial. Thus we find a "substantial reason" for the rule within the meaning of *Hicklin*.

If there is a "substantial reason" for favoring residents over nonresidents here, the step New Hampshire has taken to achieve that purpose—a requirement of residency at the time of bar admission—is surely "reasonable." Several of the alternatives that our brethren suggest, such as requiring a place of business in the state, would impose greater burdens on some practitioners, without any greater impact on the likely evils. As they note, New Hampshire's residency requirement does not prevent attorneys from maintaining bar membership if they subsequently move away. But, surely the New Hampshire Supreme Court can balance competing interests and convenience in creating its rule. Its requirement establishes some commitment to continued residency in the state and provides a sensible barrier to those with no links to the state at all.[4]

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[4] Piper places great emphasis upon the fact that New Hampshire does not strip an attorney of bar membership upon his moving out of state. This, she argues, makes it possible for former New Hampshire residents living elsewhere to still practice there, with the potential for defeating some or even most of the purposes New Hampshire says are served by its residency rule. But the Supreme Court of New Hampshire might have concluded that not many New Hampshire lawyers will both pull up stakes and continue to practice in the state. And it might further believe that the bureaucracy required to keep track of such comings and goings would not be worth the trouble, especially since many moves out of state — to Washington, D.C., for example, to work for the government — may be of short duration. We do not believe the Court would have meant *Hicklin*'s "closely tailored" language to be applied with exacting scrutiny to the bar residency requirements imposed by the highest court of a state.

Thus we believe that Rule 42 does not violate the privileges and immunities clause of the Constitution. The rule is reasonably related to furthering the state's legitimate interest in regulating the bar. *See Goldfarb* v. *Virginia State Bar*, 421 U.S. 773; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232. It satisfies the tests of *Hicklin* and *Toomer*. And, therefore, we would reverse the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1548

KATHRYN A. PIPER,
Plaintiff-Appellee,

v.

SUPREME COURT OF NEW HAMPSHIRE,
Defendant-Appellant.

Appeal From The United States District Court For The District Of New Hampshire

[Hon. Martin F. Loughlin, *U.S. District Judge*]
[539 F. Supp. 1064 (1982)]

Before
Campbell, Bownes and Breyer,
Circuit Judges.

Martin L. Gross, with whom *Sulloway, Hollis & Soden* and *Martha V. Gordon*, Assistant Attorney General, Division of Legal Counsel, were on brief, for appellant.

Jon Meyer, with whom *Law Offices of Robert A. Backus* were on brief, for appellee.

May 25, 1983

CAMPBELL, *Circuit Judge*. The issue raised by this appeal is whether New Hampshire Supreme Court Rule 42 requiring that applicants to the state bar reside within New Hampshire is constitutional. We find that it is.

Plaintiff-appellee Kathryn A. Piper lives in Lower Waterford, Vermont, less than 400 yards from the New Hampshire

border. She is admitted to the state bar of Vermont. In 1979 she applied for permission to sit for the February 1980 New Hampshire Bar Examination, signing a statement of intent to establish residence in New Hampshire, as required by Rule 42.[1] After investigation, the New Hampshire Board of Bar Examiners found her to be of good moral character and approved her request. She took the examination and was notified on April 18, 1980 that she had passed it and would become eligible for admission to the bar upon establishing a residence in New Hampshire.[2]

Piper then sent a letter to the clerk of the New Hampshire Supreme Court requesting an exception to the state's residency requirement based upon changed personal circumstances, most particularly the recent birth of a child. On May 13, 1980, the clerk of the court informed her that her request had been denied. On November 8, 1980, Piper filed a "formal petition" to the Supreme Court repeating her request for an exception. The petition was denied on December 31, 1980.

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[1] Rule 42 states in part that

> Any person domiciled in the United States and who either is a resident of the State of New Hampshire or filed a statement of intention to reside in the State of New Hampshire shall be eligible to apply for examination provided he is possessed of qualifications hereinafter provided.

According to an affidavit filed by Chief Justice John W. King, this rule has been interpretated to require that an applicant to the New Hampshire bar be a bona fide resident of the state at the time that the oath of office is administered. *See Piper v. Supreme Court of New Hampshire*, 539 F. Supp. 1064, 1066 (D.N.H. 1982).

[2] A resident of New Hampshire is one who "is domiciled or has a place of abode or both in this State and in any city, town, or other political subdivision of this State, and who has, through all of his actions, demonstrated a current intent to designate that place of abode as his principal place of physical presence for the indefinite future to the exclusion of all others." N.H. Rev. Stat. Ann. 21:6.

On March 22, 1982, Piper filed a complaint in the United States District Court for the District of New Hampshire, alleging that New Hampshire's bar residency requirement deprived her of the privileges and immunities of citizenship guaranteed in article IV of the Constitution, burdened interstate commerce, and violated the equal protection clause. A pendent state law claim, charging that the Supreme Court's Rule violated N.H. Rev. Stat. Ann. 311:2, was also alleged.

The district court, on a motion for summary judgment, found that Rule 42 violated the privileges and immunities clause. *Piper v. Supreme Court of New Hampshire*, 539 F. Supp. 1064 (D.N.H. 1982). Observing that bar regulations were subject to due process and equal protection review, the district court first reasoned that the special deference normally accorded states in governing their own bar could not exempt Rule 42 from conventional privileges and immunities review. *See Piper*, 539 F. Supp. at 1071, *citing In re Griffiths*, 413 U.S. 717 (1973) (equal protection), and *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957) (due process claim). Then, applying the standard privileges and immunities clause analysis as set forth in *Hicklin v. Orbeck*, 437 U.S. 518 (1978), the district court found the rule unconstitutional, holding that it discriminated against nonresidents who were not shown to "constitute the peculiar source of the evil" the rule addressed, and that it was not "closely tailored" to meeting its objectives, ensuring that members of the New Hampshire bar were ethical and competent.[3] *Piper*, 539 F. Supp. at 1072-74, *citing Hicklin v. Orbeck*, 437 U.S. at 525-28.

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[3] The district court also held that it was not bound by the Supreme Court's summary affirmance in *Wilson v. Wilson*, 430 U.S. 925 (1977), *aff'd sum.*, 416 F. Supp. 964 (D. Or. 1976), because although the issue was raised before the Supreme Court, the lower court in that case did not decide whether or not the privileges and immunities clause prohibited a bar residency requirement. *Piper*, 539 F. Supp. at 1068-71. *Accord Stalland v. South Dakota Board of Examiners*,

I.

We believe that principles of federalism require giving greater weight than did the district court to the right of each state court to set bar standards, including bar residency standards.[4] The legal profession has certain distinguishing features, in particular a unique relationship, grounded in the history of our nation, with the judicial branch of the state by and before which a particular lawyer is licensed to practice. To hold that henceforth the highest court of the state lacks constitutional power to enact requirements like those embodied in New Hampshire Supreme Court Rule 42 would signal a major modification in the distribution of powers under our federal system—a rearrangement not contemplated in any of the cited precedents construing the privileges and immunities clause.

The privileges and immunities clause of article IV of the Constitution provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[5] The clause, placed along side the commerce

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520 F. Supp. 116 (D.S.D. 1982). *But see* Caulfield v. *Wisconsin Board of Attorneys Professional Competence*, 490 F. Supp. 1296 (W.D. Wis. 1980), *vacated*, 645 F.2d 76 (7th Cir. 1981).

[4] After oral argument was heard in this case, the Supreme Court decided *District of Columbia Court of Appeals v. Feldman*, 51 U.S.L.W. 4295 (Mar. 23, 1983). Appellant has suggested to us that *Feldman* requires the dismissal of the instant case for lack of jurisdiction. We disagree. *Feldman* holds that a federal district court may not sit in review of a state court's application of a bar requirement to a particular individual's case. *Feldman* indicates, however, that federal courts have jurisdiction to hear generalized constitutional challenges to state bar rules. Piper's challenge is generalized. She does not question that Rule 42 applies in her case, but rather contends that such a residency requirement is unconstitutional in all cases.

[5] Although by its terms the clause applies only to privileges and immunities of citizens, it has been construed to apply equally to the privileges and immunities granted state residents. *See Hicklin v. Orbeck*, 437 U.S. 518, 524 n.8.

clause in the Constitution, was designed to serve the essential role of fusing the several states into one nation and to preserve the "structural balance essential to the concept of federalism." *Austin* v. *New Hampshire*, 420 U.S. 656 (1975). *See Toomer* v. *Witsell*, 334 U.S. 385, 396 (1948). Towards this end, the Supreme Court has held violative of the clause "state discrimination against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State." *Hicklin* v. *Orbeck*, 437 U.S. 518, 524 (1977). In *Hicklin* the Court struck down a state law favoring qualified Alaska residents over nonresidents for jobs on the Alaska pipeline. The Court said that in order to justify such a biasing of employment opportunities, Alaska had to show that the burdened noncitizens were "the peculiar source of the evil" which the statute sought to alleviate. *Hicklin* v. *Orbeck*, 437 U.S. at 525-26, *citing Toomer* v. *Witsell*, 334 U.S. 385 (1948). In addition, the statute had to be "closely tailored" to the problem it addressed. Under this latter requirement, the Court looked to whether there were alternate methods of reaching the state's goal that would be less burdensome on nonresidents. 437 U.S. at 526-27.

Until the last few years, no court to our knowledge has ever suggested that the privileges and immunities clause stripped a state's supreme court of the power to limit bar membership to state residents. Recently, however, a number of courts, like the district court in the present case, have analyzed bar residency requirements in terms similar to those set forth in *Hicklin*. *E.g.*, *Stolland* v. *South Dakota Board of Bar Examiners*, 530 F. Supp. 155 (D.S.D. 1982); *Sholey* v. *Alaska Bar Association*, 620 P.2d 640 (Alaska 1980); *Gordon* v. *Committee on Character and Fitness*, 49 N.Y.2d 266, 422 N.Y.S.2d 641, 397 N.E.2d 1309 (N.Y. 1979). Viewing the practice of law as indistinguishable from other private callings, these courts have applied the rigorous two-part test discussed in *Hicklin* to bar residency requirements. *See also Strauss* v. *Alabama State Bar*, 529 F. Supp. 173 (N.D. Ala. 1981); *Noll* v. *Alaska Bar Association*, 649 P.2d 241 (Alaska 1982); *Surpas* v. *West Virginia Board of Law Examiners*, 294 S.E.2d (W. Va. 1982). Not surprisingly, they have found that the requirements failed to satisfy this exacting scrutiny.

We do not believe, however, that the analysis developed by the Supreme Court in cases involving state restrictions upon other occupations is dispositive of the bar membership issue. The Supreme Court has pointed out that the privileges and immunities clause does not prohibit states from *ever* using state citizenship or residency to distinguish among persons. *See, e.g.*, *Baldwin* v. *Montana Fish and Game Commission*, 436 U.S. 371, 383 (1977). "Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual states." *Id.* Precisely because the privileges and immunities clause was designed to preserve a *federal* system, there has to be *some* point where limitations linked to affiliation with a given state are accorded validity. Were the clause to forbid all distinctions made upon the basis of state citizenship, the concept of statehood would become meaningless. *See Baldwin* v. *Montana Fish and Game Commission*, 436 U.S. at 383; Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 520 (1981). The idea of a sovereign state necessarily implies a political community of residents organized under laws to provide certain benefits and services to the community. Varat, *supra*, at 520. Consequently, it has always been assumed that states may base certain distinctions upon residency. *See Baldwin* v. *Montana Fish and Game Commission*, 436 U.S. at 383. As the Supreme Court stated in *Baldwin*,

> No one would suggest that the Privileges and Immunities Clause requires a State to open its polls to a person who declines to assert that the State is the only one where he claims a right to vote. The same is true as to qualification for an elective office of the State. . . . Nor must a State always apply all of its laws or all of its services equally to anyone, resident or nonresident, who may request it to do so.

Id. at 383 (citations omitted). *Cf. Dunn* v. *Blumstein*, 405 U.S. 330 (1972) (equal protection not offended by state requiring voters to be bona fide residents); *Chimento* v. *Stark*, 353 F.

Supp. 1211 (D.N.H. 1973) (seven-year residency requirement for governor does not violate right to travel), *aff'd mem.*, 414 U.S. 802 (1973).

These principles suggest that, when determining whether a state policy is valid under the privileges and immunities clause, one must take into account the policy's relationship to the state's ability to function as a unique sovereign entity. Where the policy in question is simply directed at various forms of private enterprise, the goal of national unification outweigh any threat to the state's independent existence. It is in such cases that the state is required to show a very strong and precise justification for any discrimination based upon citizenship. *E.g., Hicklin* v. *Orbeck*, 437 U.S. 518 (work related to oil pipeline); *Austin* v. *New Hampshire*, 420 U.S. 656 (commuter tax); *Toomer* v. *Witsell*, 334 U.S. 385 (shrimp fishing). Where, however, the state policy is also closely tied to the state's ability to function as a sovereign government, we think the balance shifts, with the goal of national unity being then outweighed by the policy favoring maintenance of a federal system. In such cases, the literal mandate of the privileges and immunities clause may either have no applicability, or may be applied less rigorously. *Cf. Equal Employment Opportunity Commission* v. *Wyoming*, 51 U.S.L.W. 4219, 4222 (March 1, 1983) (commerce clause limited where federal regulation addresses matters that are indisputable attributes of state sovereignty and impedes a state's ability to function in areas of traditional sovereign activity); *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 (1981) (same); *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) (same).[6]

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[6] Because of the close historical relationship between the privileges and immunities clause and the commerce clause, precedent under the latter may be useful in deciding cases under the former clause. *Hicklin* v. *Orbeck*, 437 U.S. at 531-32. The dissent argues that the commerce clause cases cited are nevertheless inapposite here because they deal with limitations upon federal power. The dissent is of course correct that *National League of Cities* and its progeny concern restrictions upon congressional power under the commerce clause. It does not follow, however, that they are inapplicable here. If congressional power under the commerce clause, which is generally considered plenary, is restricted by the demands of state sovereignty, then surely similar state interests must be respected when Congress has not attempted to legislate a national policy.

The relationship between control over state bar membership and a state's ability to function as a sovereign political body is very close. The bar is a vital component of the state judiciary which, together with the executive and legislative branches, constitutes an essential ingredient of state government. Although not state employees, lawyers have long been considered "officers of the court." This designation does not refer to the fact that lawyers are officials capable of exercising judicial powers, *see In re Griffiths*, 413 U.S. 717, 724 (1973); *Connor* v. *United States*, 350 U.S. 209 (1956), but rather to the fact that lawyers are closely associated with, and have important responsibilities to a state's court. In our adversary system, competent and dedicated lawyers are essential in order for a state's judicial system—undoubtedly one of the essential attributes of state sovereignty—to function properly. Thus, the Supreme Court has said that a state's interest in regulating lawyers is "especially great since lawyers are essential to the primary governmental function of administering justice. . . ." *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975). *See also Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). Accordingly, state bar regulations have usually been granted substantial deference by the federal courts. *See District of Columbia Court of Appeals* v. *Feldman*, 51 U.S.L.W. 4295, 4291 n.16 (Mar. 23, 1983); *Middlesex County Ethics Committee* v. *Garden State Bar Association*, 51 U.S.L.W. 4712, 4715 (June 21, 1982) (Brennan, J., concurring).[7]

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[7] Of course, a state cannot regulate its bar in such a way as to deny an applicant freedom of speech, *see Schware* v. *Board of Bar Examiners*, 353 U.S. 232, or equal protection of the laws. *See In re Griffiths*, 413 U.S. 717. But, even when a court reviews a first

This special relationship between a state's bar and its judicial system militates against treating bar regulations challenged under the privileges and immunities clause as simply another species of regulation over private commerce.[9] Rather regulations promulgated by a state's highest court determining the qualifications of those entitled to practice before it and the inferior state tribunals deserve a very substantial degree of deference, as they go to the heart of a state's ability to identify itself as such and to function as a political entity. A state would be impotent indeed were it without power to

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amendment attack upon a state bar regulation, a federal court must be mindful that "Admission to practice in a State and before its courts necessarily belongs to that State." *Sobrero*, 350 U.S. at 249 (Frankfurter, J., concurring). *Cf. Middlesex County Ethics Commission v. Garden State Bar Association*, 51 U.S.L.W. 4711 (federal court should abstain from hearing first amendment challenge to a pending state ethics committee proceeding).

[9] Figur cites *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), for the argument that the practice of law is merely a form of private commercial activity. We do not believe that these cases stand for any such proposition. In *Goldfarb* the Supreme Court held that a minimum fee arrangement established by a *voluntary* bar association violated the Sherman Act, 15 U.S.C. § 1. The Court's opinion made clear it "intend[ed] no diminution of the authority of the State to regulate its professions." 421 U.S. at 793. In *Bates*, the Court held that a total ban on price advertising by attorneys violated the first amendment. The Court there emphasized the narrowness of its holding, a point which was made clear in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), which held that states can ban in-person solicitation by lawyers seeking clients for profit. Cases arising under the first amendment appear to provide little guidance on how the privileges and immunities clause should be applied to state bar regulations. The first amendment has long been applied to bar regulations. *See, e.g., Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), and the unique problem in privileges and immunities clause cases of balancing state sovereignty with national unity is not presented in the first amendment area.

require officers such as its own attorneys to owe it a citizens allegiance."

Accordingly where bar regulations are at issue we believe the strict test enunciated in *Hicklin* is not controlling, and that such regulations are valid so long as reasonably related to legitimate state objectives. We find support for our position in *Leis v. Flynt*, 439 U.S. 438 (1979) (per curiam). In that case two out-of-state attorneys challenged an Ohio court's refusal to grant them a hearing on their applications to appear *pro hac vice*. Although the Court there did not have occasion to decide the issue now before us, its analysis lends strength to the view that states are to be given considerable deference in regulating the practice of law in their state by nonresident attorneys. The Court first found that the out-of-state attorneys had no federally protected right to practice law in another state. The Court stated that "Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct." *Id.* at 442. The Court further stated that a Second Circuit case, *Spence v. Sinacusa Theatres Corp.*, 364 F.2d 161 (2d Cir.) (en banc), *cert. denied*, 385 U.S. 987 (1966), which had found a New York *pro hac vice* regulation violative of the privileges and immunities clause was "limited if not rejected entirely" by *Norfolk & Western R. Co. v. Beatty*, 423 U.S. 1008, *aff'd mem.*, 400 F. Supp. 224 (S.D. Ill. 1975), a case rejecting a constitutional challenge to the Illinois *pro hac vice* rule. *Leis v. Flynt*, 439 U.S. at 442 n.4. While the full import of this state-

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[9] We, of course, do not suggest that a state bar cannot operate without a residency requirement. Many states have apparently abandoned such requirements in recent times—a point our dissenting colleague makes at the end of his opinion. The question is not whether a residency requirement is desirable but whether the judicial branch of each state may decide this question for itself, as has been done since the founding of the Republic.

ment for bar residency requirements is uncertain, it supports our conclusion that the rigorous privileges and immunities analysis utilized in the private employment area is inappropriate here. Had the traditional rigorous review been applicable in the *pro hac vice* cases, those regulations, even if they ultimately had been upheld, would have been subjected to a far more exacting scrutiny than they were."

III.

Under a less restrictive test, Rule 42 does not violate the privileges and immunities clause of the Constitution. The rule is reasonably related to furthering the state's legitimate interest in regulating the bar so as to assure the competence and moral character of its members. *See Goldfarb* v. *Virginia State Bar*, 421 U.S. 773; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232.

New Hampshire's bar residency requirements ensures that lawyers who practice within the state at least begin their practice there. While they may thereafter move away without forfeiting their bar membership, it seems reasonable to predict that most people who go to the trouble of qualifying for the bar in their state of residence do so with the expectation of remaining and practicing there.[9] It is also reasonable to conclude that

[9] We find further support for our decision from the Supreme Court's summary affirmance in *Wilson* v. *Wilson*, 430 U.S. 925 (1977), *aff'g mem.*, 426 F. Supp. (D. Or. 1976). While the district court in that case did not decide whether residency requirements violated the privileges and immunities clause, the issue was squarely presented in the appellant's jurisdictional statement to the Supreme Court. Although because of our decision we find it unnecessary to decide whether the district court here erred by finding that *Wilson* was not "binding" precedent, *see* note 8, *supra*, we believe that *Wilson* at least demonstrates the Supreme Court's disinclination to review rigorously bar residency requirements.

[10] Piper places great emphasis upon the fact that New Hampshire does not strip an attorney of bar membership upon his moving out of state. This, she argues, makes it possible for former New Hampshire

as a result of that rule, New Hampshire lawyers are likely to be more familiar with local rules and concerns than they would otherwise be. More importantly, residents of the state are more likely than nonresidents to feel personally affected by the administration of justice within the state. Consequently, resident lawyers may feel more dedicated to their New Hampshire practice than would nonresident attorneys. This might not only lead resident attorneys to be more willing to accept pro bono cases and perform other forms of public service within the state, but it might also induce resident attorneys to practice a higher quality of law thereby improving the administration of justice within the state.

New Hampshire also argues that it would be easier for it to discipline miscreant lawyers who reside within the state than those who live elsewhere. Although it would theoretically possible for the state to discipline nonresident attorneys, we see nothing unreasonable in the state's belief that its disciplinary apparatus would be more effective and serve as a stronger deterrent if it did not have to rely upon asserting authority over nonresidents. Similarly, it might be easier as a practical matter to impose special "service" obligations upon bar members if the bar does not have a substantial nonresident component. If nonresidents are entitled to membership as of right,

residents living elsewhere to still practice there, with the potential for defeating some or even most of the purposes New Hampshire says are served by its residency rule. But the Supreme Court of New Hampshire might have concluded that not many New Hampshire lawyers will both pull up stakes and continue to practice in the state. And it might further believe that the bureaucracy required to keep track of such comings and goings would not be worth the trouble, especially since many moves out of the state — to Washington, D.C., for example, to work for the government — may be of short duration. If we were to apply *Hicklin's* "loosely tailored" language strictly, our conclusions might be different. But we think the bar residency rules of the highest court of a state need not pass through such a fine-grain sieve.

they are likely to feel they also have a right not to be forced to perform pro bono services in a state where they do not reside.

Furthermore, New Hampshire's residency requirement is not unreasonably burdensome. Applicants may take the New Hampshire bar examination prior to residing in New Hampshire. They are not required to move to the state before knowing whether or not they can practice there. *Compare Strauss* v. *Alabama State Bar*, 520 F. Supp. 173 (rule requiring applicants to live within state for three weeks prior to taking the bar violates the privileges and immunities clause); *Gordon* v. *Committee on Character and Fitness*, 48 N.Y.2d 266, 422 N.Y.S.2d 641, 397 N.E.2d 1309 (requirement to live within state six months prior to taking bar examination violates privileges and immunities clause). Nor are applicants to the New Hampshire bar required to reside within the state for any lengthy period of time before being admitted to the bar—and, indeed, they may leave soon thereafter. *See* note 11, *supra*. All the state requires is that the applicant reside within New Hampshire at the time of his or her admission. We do not find such a requirement at all unreasonable given its relationship to the state's legitimate goals. We therefore hold that Rule 42 does not violate the privileges and immunities clause.

III.

Piper also raised claims under the commerce clause and the equal protection clause of the fourteenth amendment. Although the district court did not reach these claims, we believe it useful to discuss them briefly now.

Our analysis of the privileges and immunities clause claim readily resolves Piper's commerce clause claim. As was noted above, the two constitutional clauses, each found in article IV, share a related history and precedent under either of the clauses is useful in deciding cases brought under the other. *Hicklin* v. *Orbeck*, 437 U.S. at 532. We see no reason why our analysis under the privileges and immunities clause should not apply to Piper's commerce clause claim.

The finding that Rule 42 is related to a legitimate state goal also disposes of Piper's equal protection claim because she has asserted no discrimination against a suspect class warranting an enhanced form of review.[12] Moreover, federal courts that have considered equal protection challenges to bar residency requirements have uniformly upheld the requirements except in those cases in which the state imposed a lengthy durational requirement. *Compare Rose* v. *Boudreaux*, 409 U.S. 1020 (1972) (upholding six-month residency requirement); *Kline* v. *Rankin*, 352 F. Supp. 292 (N.D. Miss. 1972) (upholding 90-day residency requirement) *with Lipman* v. *Van Zant*, 329 F. Supp. 391 (N.D. Miss. 1971) (one-year residency requirement violated equal protection clause); *Keenan* v. *Board of Law Examiners*, 317 F. Supp. 1360 (E.D.N.C. 1970) (one-year residency requirement is unconstitutional). Because the New Hampshire rule imposes no durational requirement, it clearly does not violate the equal protection clause.

IV.

In her complaint, Piper also raised a pendent state law claim, charging that Rule 42 violates New Hampshire Rev. Stat. Ann. 311:2. The district court did not decide this issue. Given the special deference due the state court in matters concerning bar regulations, and the particular awkwardness involved in our reviewing whether the state's highest court has minister-

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[12] An enhanced form of review might arguably be justified if the rule infringed upon Piper's right of interstate travel. *See, e.g., Shapiro* v. *Thompson*, 394 U.S. 618 (1969). Piper, however, can make no such claim. Non-durational residency requirements, such as the one in question, which permit out-of-staters to receive equal benefits as state residents upon moving into the state, do not infringe upon the right of interstate travel. *See McCarthy* v. *Philadelphia Civil Service Commission*, 424 U.S. 645 (1976) (per curiam). *Compare Zobel* v. *Williams*, 50 U.S.L.W. 4613 (June 14, 1982) (Brennan, J., concurring) (right to travel infringed upon where state predicates benefits upon length of residency within the state).

preted a state statute, we decline to resolve this claim. *See United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966) ("[P]endent jurisdiction is a doctrine of discretion, not of plaintiff's right.").

Reversed.

BOWNES, *Circuit Judge* (dissenting). I dissent from the majority's opinion because I cannot accept my brothers' unwarranted deviation from the established constitutional principles that I believe should guide our decision in this case. While the majority concedes that the privileges and immunities clause is applicable to New Hampshire's attempt to restrict admission to the state bar to state residents, it shackles the thrust of the clauses's command. The majority drastically reduces the burden that New Hampshire bears to justify discrimination against nonresidents by adopting a "political function" exception to the traditional privileges and immunities clause test which was established by the Supreme Court in *Toomer* v. *Witsell*, 334 U.S. 385 (1948), and is the law today. *See Hicklin* v. *Orbeck*, 437 U.S. 518, 525-28 (1978). Under the majority's test, when the state action at issue is "closely tied to the state's ability to function as a sovereign government," *ante* at 10, the exacting scrutiny mandated by *Toomer* and *Hicklin* is watered down to only a showing that the discrimination against nonresidents bears a rational relationship to some legitimate state goal.

I believe this approach is wrong for two reasons. First, it is unnecessary to adjust the prevailing standard of review to account for political functions; Supreme Court jurisprudence concerning the privileges and immunities clause at present reflects a concern for the appropriate relationship between state sovereignty and interstate equality. Second, a state's regulation of admission to the bar is not a state policy that is, as the majority posits, "closely tied to the state's ability to function as a sovereign government." *Ante* at 10.

I.

The Supreme Court has established the point at which to undertake an analysis of whether a state's discrimination against nonresidents is necessary for the state to function as a sovereign government. *See Baldwin* v. *Fish and Game Commission of Montana*, 436 U.S. 371 (1978). This analysis is performed by a court when determining whether the privileges and immunities clause applies to the particular discrimination at all. *See* Note, *A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV*, 92 Harv. L. Rev. 1461, 1476 (1979).

In *Baldwin* v. *Fish and Game Commission of Montana*, 436 U.S. 371, the Court discussed the types of interests within the purview of the privileges and immunities clause. It noted that the clause "has been interpreted to prevent a State from imposing unreasonable burdens on citizens of other States in their pursuit of common callings within the State; in the ownership and disposition of privately held property within the State; and in access to the courts of the State." *Id.* at 383 (citations omitted). On the other hand, the privileges and immunities clause has never impeded a state in discriminating against noncitizens with respect to voting or qualifying for public office.

> Suffrage . . . always has been understood to be tied to an individual's identification with a particular State. *See, e.g., Dunn* v. *Blumstein*, 405 U.S. 330 (1972). No one would suggest that the Privileges and Immunities Clause requires a State to open its polls to a person who declines to assert that the State is the only one where he claims a right to vote. The same is true as to qualification for all elective office of the State. *Kanapaux* v. *Ellisor*, 419 U.S. 891 (1974); *Chimento* v. *Stark*, 353 F. Supp. 1211 (NH), summarily aff'd, 414 U.S. 802 (1973).

Baldwin, 436 U.S. at 383. Similarly, a state need not always treat residents and nonresidents equally with respect to the application of its laws and services. *Id.*

The proper approach in any case is to determine, initially, whether the discrimination against nonresidents affects an interest that "bear[s] upon the vitality of the Nation as a single entity. . . ." *Id.*; *see id.* at 388 (elk hunting not basic to maintenance or well-being of Union; interest in elk hunting not within purview of privileges and immunities clause). Once it is determined that the interest affected by the discrimination is protected by the clause, the state must then justify the discrimination under the test outlined by the Supreme Court in *Toomer v. Witsell*, 334 U.S. 385, and reaffirmed in *Hicklin v. Orbeck*, 437 U.S. 518. *See Baldwin*, 436 U.S. at 385-86 (state cannot confine state resources to own residents when, without reason, it interferes with nonresident's right to pursue livelihood; this right protected by privileges and immunities clause). A political function analysis is part of the initial determination of whether the interest affected is within the purview of the privileges and immunities clause. In deciding that the discrimination is subject to the strictures of the clause, the court necessarily determines that disparate treatment of residents and nonresidents is not essential to the preservation of the sovereign identity of the state. *See Baldwin*, 436 U.S. at 383 (privileges and immunities clause never applicable to right to vote and hold elective office; distinction between residents and nonresidents merely reflects fact that this nation is composed of individual states).

The majority's approach is flawed because it reintroduces sovereignty considerations at an improper point in the privileges and immunities clause analysis. In so doing, the majority unnecessarily lessens the burden a state must bear to justify discrimination against nonresidents. If, indeed, the interest affected by the discrimination is not protected by the clause, the state need not justify any preference afforded to residents. But, if the interest is protected, the constitutional rights of an individual are at stake, and the state must bear a heavy burden to justify the infringement.

My reading of the precedent relied on by the majority reveals the absence of support for its attempt to change the

proper standard of review. The majority correctly notes that *Hicklin v. Orbeck*, 437 U.S. 518, suggests that precedent under the commerce clause is helpful in interpreting the privileges and immunities clause. *Id.* at 531-32. The majority, however, looks to a line of commerce clause cases that are inapposite to a proper understanding of the privileges and immunities clause.

The commerce clause and the privileges and immunities clause are similar because both act as a limit on a state's ability to grant preferences to its own citizens to the disadvantage of noncitizens. Thus *Hicklin*, *id.* at 532-33, refers to cases in which the Supreme Court, relying on the commerce clause, invalidated states' attempts to limit use of in-state resources to state residents. *Id.* at 532 (in *West v. Kansas Natural Gas*, 221 U.S. 229 (1911), Court held Oklahoma's prohibition on out-of-state shipment of in-state natural gas violates commerce clause); *Hicklin*, 437 U.S. at 532 (in *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), Court held West Virginia's requiring natural gas companies to prefer state residents violates commerce clause); *Hicklin*, 437 U.S. at 532 (in *Foster Packing Co. v. Haydel*, 278 U.S. 1 (1928), Court held commerce clause prohibits Louisiana's attempt to require in-state processing of indigenous shrimp as prerequisite to out-of-state shipment). The commerce clause cases relied on by the majority, *National League of Cities v. Usery*, 426 U.S. 833 (1976), and its progeny, *EEOC v. Wyoming*, 51 U.S.L.W. 4219 (U.S. March 2, 1983), and *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981), deal with limitations on the *federal* power to regulate commerce. They say nothing about state power or the legitimacy of state discrimination in favor of state residents.

The majority also asserts that *Lein v. Flynt*, 439 U.S. 459 (1979) (per curiam), supports reducing the burden a state bears to justify discrimination under the privileges and immunities clause in the setting of the instant case. The obvious flaw in this argument, which is noted by the majority, is that *Lein* did not discuss the privileges and immunities clause. In fact, the clause

was not implicated in the case because the *pro hac vice* statute at issue did not discriminate on the basis of citizenship. The only distinction drawn was between those persons who were members of the Ohio bar and those who were not.

Nor can I find any support for the majority in the Supreme Court's reference in *Leis* to its summary affirmance in *Norfolk and Western Railway Co.* v. *Beatty*, 423 U.S. 1069 (1975), *aff'g mem.* 400 F. Supp. 234 (S.D. Ill. 1975). The majority asserts that the rejection of the privileges and immunities clause claim in *Norfolk and Western* indicates that a less rigorous standard of review is applied to privileges and immunities clause cases dealing with regulation of attorneys. It argues that even if the regulations at issue ultimately had been upheld, they would have been reviewed under a far more exacting scrutiny.

This conclusion is without foundation. In *Norfolk and Western* the plaintiffs argued that they were constitutionally entitled to be represented in Illinois by out-of-state counsel. 400 F. Supp. at 236. They relied primarily on *Spanos* v. *Skouras Theatres Corp.*, 364 F.2d 161 (2d Cir.) (in banc), *cert. denied*, 385 U.S. 976 (1966), which held that a plaintiff presenting a federal claim has a constitutional right under the privileges and immunities clause to have its out-of-state counsel appear on a *pro hac vice* basis. *Id.* at 170-71. In *Norfolk and Western* the court simply rejected the notion that any such right existed. 400 F. Supp. at 237-38. The court did not give less exacting scrutiny to the claim; it gave no scrutiny at all.

II.

Under the appropriate standards for resolving privileges and immunities clause cases, New Hampshire's bar admission restriction cannot withstand scrutiny. First, the practice of law is not within the limited political function exception to the range of interests protected by the privileges and immunities clause.

As explained by the Supreme Court in *Baldwin* v. *Fish and Game Commission of Montana*, 436 U.S. 371, the political

function exception is a recognition that "[s]ome distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted. . . ." *Id.* at 383. There is no exhaustive list of rights that must be reserved to a state's own citizens in order to enable the state to retain its sovereign identity. In *Baldwin* the Supreme Court identified the right to vote and to hold elective office as interests that legitimately should be tied to state citizenship. Additional guidance can be found in cases recognizing a state's right to distinguish between aliens and citizens when such distinctions are necessary for the state to retain its status as a separate political community.

In a long line of Supreme Court cases aliens have mounted equal protection clause challenges to states' attempts to make citizenship a qualification for participation in a state benefit, and many of these challenges have been successful. *See, e.g.*, *Nyquist* v. *Mauclet*, 432 U.S. 1 (1977); *In re Griffiths*, 413 U.S. 717 (1973); *Graham* v. *Richardson*, 403 U.S. 365 (1971); *cf. Examining Board of Engineers* v. *Flores de Otero*, 426 U.S. 572 (1976) (Puerto Rico cannot make United States citizenship qualification for civil engineering license). The Supreme Court also has recognized that a state has an inherent obligation " 'to preserve the basic conception of a political community.' " *Sugarman* v. *Dougall*, 413 U.S. 634, 647 (1973) (quoting *Dunn* v. *Blumstein*, 405 U.S. 330, 344 (1972)).

> [T]his power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government. There . . . is "where citizenship bears some rational relationship to the special demands of the particular position."

Sugarman, 413 U.S. at 647 (quoting *Dougall* v. *Sugarman*, 339 F. Supp. 906, 911) (Lombard, J., concurring)). Thus, in this limited area a state may draw lines based on affiliation with the sovereign government because of the state's special need

to retain its sovereign identity. *See Cabell* v. *Chavez-Salido*, 454 U.S. 432 (1982) (probation officers); *Ambach* v. *Norwick*, 441 U.S. 68 (1979) (public school teachers); *Foley* v. *Connelie*, 435 U.S. 291 (1978) (police officers).

This reluctance to interfere with a state's protection of its sovereign identity serves the same purpose as the political function exception to the privileges and immunities clause. Both recognize that in certain areas a state must have a citizen's allegiance to perform properly the special functions that a state owes to its citizens. Basically, a state can require that those who govern the state or contribute to it in a uniquely sovereign way must be part of the same political community as those who are governed.

Lawyers do not fall within this special group of individuals who help the state in performing its sovereign functions. *See* Note, *supra* p. 22, at 1476-79. This conclusion was reached by the Supreme Court when it refused to allow a state to prohibit aliens from qualifying for admission to the state's bar.

> Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts. Moreover, by virtue of their professional aptitudes and natural interests, lawyers have been leaders in government throughout the history of our country. Yet, they are not officials of government by virtue of being lawyers. Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy.

In re Griffiths, 413 U.S. at 729 (footnote omitted).

Thus, when a state seeks to limit access to the bar on the basis of citizenship, it is not entitled to the deference it would be given if the limitation were tied to its sovereign needs. Rather, a citizenship restriction for lawyers should be treated the same as any citizenship qualification that affects the economic interests of the discriminatees. *See Cabell* v. *Chavez-Salido*, 454 U.S. at 439-39; *Ambach* v. *Norwick*, 441 U.S. at 76 n.6. Under the privileges and immunities clause, this means

that the state must satisfy the tests laid out in *Toomer* and *Hicklin*.

To justify its rule excluding nonresidents from the bar New Hampshire must show that nonresidents "constitute a peculiar source of the evil at which the [rule] is aimed," *Hicklin*, 437 U.S. at 525-26 (quoting *Toomer*, 334 U.S. at 398), and that the rule is closely tailored to eradicating the evil nonresidents present. That is, that the state cannot achieve its goal through a method that would be less onerous for nonresidents. *See Hicklin*, 437 U.S. at 527-28. New Hampshire cannot meet this burden.

The evils that New Hampshire claims nonresidents present are: (1) ignorance of local practice and rules; (2) disregard for developing a good reputation in the state; and (3) difficulty of ensuring nonresidents' availability for court proceedings and subjecting them to disciplinary action. The responsibility for these evils cannot be placed solely on nonresidents. Any new lawyer is ignorant of local practice and rules. As the district court pointed out, developing a good reputation is a function of the "heart," not the home. As to availability for court proceedings, many nonresidents are closer to New Hampshire courts that are residents. New Hampshire's long-arm statute makes it as easy for the state to reach and discipline nonresident lawyers as it is to reach and discipline residents.

Numerous less drastic and more closely tailored alternatives are available to the state. New Hampshire already requires all new lawyers to participate in a legal skills course soon after admission to the bar. Additional continuing legal educational requirements could be imposed. Similarly, the state through its power to regulate members of the bar can control courtroom decorum and set standards for professional conduct and trial practice. New Hampshire has an integrated bar association to which all lawyers who have been admitted to the bar must belong. In short, as the district court found, New Hampshire cannot show that its exclusion of nonresidents from the bar is necessary to achieve any legitimate goal.

III.

Finally, even under the test laid out by the majority, New Hampshire's rule is irrational. *See Toomer v. Witsell*, 334 U.S. 385, 402 (1970). While on the one hand the state claims that residence in the state is necessary to practice properly as a New Hampshire lawyer, there is no requirement that a lawyer remain a New Hampshire resident any longer than the day he or she is admitted to the bar. Thereafter, the properly admitted lawyer can live anywhere at all and still practice in New Hampshire. It is obvious that the purpose of the rule is an attempt to restrict the practice of law in New Hampshire to residents of that state. The attempt is both unconstitutional and ineffective.

In closing, I note the irony of a majority opinion written by those who are members of a bar (Massachusetts) that has no residency requirements and a dissent written by a member of the New Hampshire bar who has practiced law only in New Hampshire.

For the foregoing reasons, I think the New Hampshire rule is unconstitutional and I would affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-1349

KATHRYN A. PIPER,
Plaintiff-Appellee,

v.

SUPREME COURT OF NEW HAMPSHIRE,
Defendant-Appellant.

ERRATA SHEET

In the Court's opinion in this case issued May 25, 1993, on page 16, footnote 11, line 4 from bottom, "lowly tailored" should read "closely tailored."

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1549

KATHRYN A. PIPER,
Plaintiff-Appellee,

v.

SUPREME COURT OF NEW HAMPSHIRE,
Defendant-Appellant.

JUDGMENT

Entered December 5, 1983

This cause came on to be submitted on petition for rehearing en banc.

This Court being divided 2-2 upon en banc reconsideration, it is now here ordered, adjudged, and decreed as follows:

The judgment of the District Court is affirmed.

By the Court:

Francis P. Scigliano
Clerk.

[cc: Messrs. Gross & Meyer]

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1548

KATHRYN A. PIPER,
Plaintiff-Appellee,

v.

SUPREME COURT OF NEW HAMPSHIRE,
Defendant-Appellant.

Before
CAMPBELL, Chief Judge,
COFFIN, BOWNES and BREYER, Circuit Judges.

FILED
Clerk's Office
AUG 2, 2:47 PM '83
US COURT OF APPEALS
FOR THE FIRST CIRCUIT

ORDER OF COURT

Entered August 2, 1983

The appellee Kathryn A. Piper petitions this court to rehear en banc the above-captioned case. We hereby grant the petition. The panel's opinion is withdrawn and the judgment is vacated. The case will stand submitted on briefs. The briefing schedule shall be as follows. Kathryn A. Piper and the Supreme Court of New Hampshire may file supplemental briefs not to exceed 15 pages, no later than August 24, 1983.

By the Court:

Clerk.

[cc: Messrs. Gross and Meyer.]

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1548

KATHRYN A. PIPER,
Plaintiff-Appellee,

v.

SUPREME COURT OF NEW HAMPSHIRE,
Defendant-Appellant.

FILED
Clerk's Office
MAY 25, 12:25 PM '83
US COURT OF APPEALS
FOR THE FIRST CIRCUIT

JUDGMENT

Entered May 25, 1983

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is reversed.

By the Court:

Clerk.

[cc: Messrs. Gross and Meyer.]

APPENDIX F

THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

#C82-125-L

KATHRYN A. PIPER,

v.

SUPREME COURT OF NEW HAMPSHIRE,

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The court has the following motions before it. Defendant's motion to dismiss, Supreme Court's motion to dismiss, plaintiff's motion for summary judgment and the plaintiff's motion for preliminary injunction which at the time of the hearing on May 6, 1982 is unfortunately moot. It has been agreed that the court can rule on one motion which is despositive of all, that will be plaintiff's motion for summary judgment.

Plaintiff Kathryn A. Piper is a resident of Lower Waterford, Vermont, less than 400 yards from the New Hampshire border, and is admitted to practice before the State Bar of Vermont and the United States District Court for the District of Vermont. Upon application to the New Hampshire Board of Bar Examiners for permission to sit for the February, 1980 New Hampshire Bar Examination, the Board found her to be of good moral character and to possess suitable qualifications, and accordingly granted her permission. She took the February 27-28, 1980 Bar Examination and on April 18, 1980 was advised that she had received a passing score and would be recommended by the Board of Bar Examiners for admission to the New Hampshire Bar. At the time of taking the examination, she filed a good faith statement of intent to reside in New Hampshire. She was informed by the Board of Bar Examiners that she must establish a home residence in New Hampshire in order to be admitted to the bar. She filed a request for an

exception to the residency requirement which was denied by the supreme court. She then filed a formal petition to the supreme court to grant her an additional exception which was also denied. In consequence of defendants' action, plaintiff has been unable to practice law in New Hampshire and now faces the threat that she will be required to retake the bar exam pursuant to Supreme Court Rule 42(8) requiring that applicants be admitted within two years of being notified of successful passage of the exam.

On July 25, 1979 plaintiff wrote to George Pappagianis, then Clerk of the New Hampshire Supreme Court, now a justice of the New Hampshire Superior Court. Part of the contents of the letter are as follows.

> Due to the innumerable conflict of interest problems that would arise should I enter the private practice of law in the same town as my husband, I have decided that I would like to seek employment in New Hampshire upon termination of my clerkship with the Second Circuit this fall.
>
> My main concern, of course, is satisfaction of the residency requirement. Moving to New Hampshire between now and February would present a considerable hardship for my husband and myself due to the tight mortgage market and due to the fact that we are expecting a child in the middle of March.

Succinctly, the issue in the case is whether the plaintiff who has successfully passed the New Hampshire Bar examination can be excluded from practicing in New Hampshire because she is a non-resident.

Rule 42 of the New Hampshire Supreme Court is entitled Admission to the Bar; Committee on Character and Fitness.

The court has culled from Rule 42 those sections which are opposite to the facts of this case.

42(3)

> Any person domiciled in the United States and who either is a resident of the State of New Hampshire or filed

> a statement of intention to reside in the State of New Hampshire shall be eligible to apply for examination provided he is possessed of the qualifications hereinafter provided.

42(7)(a)(b)

> Each person seeking to practice law in New Hampshire, who has taken and passed the bar examination is required to attend a practical skills course to be presented annually by the New Hampshire Bar Association. The course will assist new lawyers in developing basic lawyering skills and practical knowledge. Attendance is required and each new admittee will be required to executive an affidavit stating that he or she has attended each session of the course unless otherwise excused by the supreme court. A special committee of the New Hampshire Bar Association Continuing Legal Education Committee will administer the practical skills course but no test will be required. Each new admittee will be licensed to practice law subject to the condition that he or she completes the practical skills course within one year of the date of admission to the bar (unless in exceptional instances a longer period is approved in writing by the New Hampshire Supreme Court) or his or her license to practice shall be revoked.
>
> (b) A new admittee's license to practice shall not be so revoked if, within one year after being admitted to the bar and before completing the practical skills course, he or she leaves New Hampshire intending later to return to practice in this state and promptly so notifies the Court in writing; provided however he or she returns to New Hampshire to practice law within three years of admission, notifies the Court immediately of his or her return and attends the first available practical skills course. Failure to comply with the foregoing conditions will result in automatic revocation of the license to practice. Readmission will require reexamination.

In plaintiff's motion for preliminary injunction, she raised the issue that under Rule 42 she would be required to retake and pass for the second time the New Hampshire Bar Examination if not admitted by April 18, 1982.

The court has for its edification various affidavits filed by the parties.

Ralph H. Wood, Clerk of the New Hampshire Supreme Court, filed an affidavit stating that in order for a successful applicant to be admitted to the New Hampshire Bar she or he must establish residency in New Hampshire. The applicant by written oath must state his or her New Hampshire address. When plaintiff signed the Petition and Questionnaire for Admission to the New Hampshire Bar she stated under oath that she intended to become a resident of Littleton, New Hampshire.

Chief Justice John W. King of the New Hampshire Supreme Court filed an affidavit stating:

> As consistently interpreted by the New Hampshire Supreme Court, RSA Ch. 311 and Supreme Court Rule 42 require that an applicant for admission to the New Hampshire Bar be a *bona fide* resident of the State of New Hampshire at the time that the oath of office set forth in RSA 311:6 is administered. The oath of office includes the fact that the attorney will be an officer of the court and must support the Constitution of this State. RSA 311:6. Nonresidents could hardly be expected to carry out these solemn duties.
>
> As interpreted by the New Hampshire Supreme Court, the residency requirement involves more than mere physical presence in the State of New Hampshire at the time of admission. "Residency," for purposes of admission to the Bar, contemplates that an applicant intends that the State of New Hampshire will be his or her "(p)rincipal place of physical presence for the indefinite future to the exclusion of all others." Cf. RSA 21:6.
>
> The requirement of actual residence at the time of admission to the New Hampshire Bar promotes the State of New Hampshire's interest in ensuring that attorneys admitted to practice will become, and remain, familiar with local rules and practices. Attorneys who have indicated, under oath, that they intend to reside in New Hampshire for the indefinite future are clearly more likely to become familiar with the laws and rules of the State of New Hampshire. That the State of New Hampshire demands such familiarity with local practice and procedure, above and beyond the knowledge of substantive law required for the bar examination, from attorneys admitted to the New Hampshire Bar is reflected in the New Hampshire Supreme Court's rule requiring all new admittees to complete a practical skills course within one year of admission. *See* Supreme Court Rule 42(7).
>
> The residency requirement also ensures, to the extent possible, that attorneys admitted to practice in the State of New Hampshire maintain high standards of ethics, as well as competency, as residency within the State reinforces a practicing attorney's interest in his or her reputation as a lawyer in the legal community.
>
> The residency requirement facilitates the State's interest in ensuring that all attorneys are readily available for court proceedings and easily subject to disciplinary action by the New Hampshire Supreme Court.
>
> The residency requirement promotes the continued vitality of a competent, stable and well informed State Bar. The New Hampshire Bar is an integrated bar which depends heavily on the active participation of all of its members in its efforts to improve the quality and extent of legal services offered within the State of New Hampshire. In the absence of a residency requirement, the burden of providing those voluntary services currently provided by members of the New Hampshire Bar in such areas as participation in bar association committees; presentation of continuing legal education programs; participation in significant *pro bono* cases on a volunteer basis; and participation in community programs designed to afford information to the public about the services offered by the New Hampshire Bar; would fall disproportionately on those members of the Bar who happen to reside within the State. Similarly, the burden of handling court-appointed cases, such as those required under the indigent defense program, would, as a practical matter, fall on resident members of the New Hampshire Bar.
>
> Apart from the residency requirement itself, applicable to all applicants for admission, the New Hampshire Supreme Court imposes no other requirements upon residents of other states who seek admission to the New Hampshire Bar. The qualifications required for admission, and the fees imposed, are identical for resident and non-resident applicants.

George Bruno, editor of the 1982 New Hampshire Law Directory and Daybook filed an affidavit. Attached thereto was an alphabetical listing of the members of the New Hampshire Bar with the business addresses.

The plaintiff filed affidavits which are incorporated mainly in the undisputed facts.

Plaintiff's exhibit 1 is a list of out of state attorneys admitted to practice in New Hampshire.

All parties concur that a "hurdle of awkward proportions" is *Wilson* v. *Wilson*, 416 F. Supp. 984 (D. Oregon 1976), aff'd mem. 430 U.S. 925 (1977). The basis, and thus the precedential value, of that opinion is open to some questions. The facts were analogous to those at bar. Mr. Wilson, admitted to practice in California, desired to practice in Oregon where he maintained a farm residence part of the year. The Oregon statute required applicants to be citizens of the state. The statute was interpreted to require a statement of intent to reside and actual residence at the time of admission. It was this first interpretation, failure to sign the statement of intent, that was the basis for denial of Mr. Wilson's application that is relevant here.

The parties here have submitted as authority the opinions of District Judges in two other districts as to the binding effect of *Wilson* v. *Wilson*, *supra*. Defendants cite *Canfield* v. *Wisconsin Board of Attorneys Professional Competence*, 490 F. Supp. 1286 (W.D. Wis. 1980), vacated for mootness, 645 F.2d 76 (7th Cir. 1981), for the proposition that *Wilson* is mandatory precedent. Plaintiffs cite *Stalland* v. *South Dakota Board of Bar Examiners*, Civil No. 81-3046 (D. South Dakota January 15, 1982), which distinguished both *Wilson* and *Canfield*. We turn to a closer examination of these cases.

The *Canfield* court was presented a case directly confronting the constitutionality of a residence requirement. Mr. Canfield stated on his application "I am not a resident of the State of Wisconsin nor do I plan to become a resident of the State of

Wisconsin." When the Board of Professional Competency denied his application for failure to satisfy the residency requirement, Mr. Canfield filed suit alleging violations of the privileges and immunities clause of Article IV § 2, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. While acknowledging that the precise ruling of the *Oregon* district court in *Wilson* was the constitutionality of the requirement of the statement of intent, the *Canfield* court considered the summary affirmance of the Supreme Court to reach all of the issues presented in the jurisdictional statement.

> In the *Wilson* case, by it summary affirmance, the Supreme Court necessarily decided and rejected the specific challenges presented in the statement of jurisdiction, leaving undisturbed the judgment appealed from. Although I need not accept the reasoning of the three-judge court in *Wilson*, I must abide by the result reached by it and by the Supreme Court. *Mandel* v. *Bradley*, *supra*, 432 U.S. at 176, 97 S.Ct. at 2240. Therefore, in the present case in this court I must reject on its merits the federal constitutional challenge to the Wisconsin statute and rules.

490 F. Supp. 1290. The plaintiff-appellant's jurisdictional statement to the Supreme Court had phrased the question in terms of the constitutionality of the residency requirement. 490 F. Supp. 1289, 45 L.W. 3545. The *Canfield* court concluded that the Supreme Court's summary affirmance necessarily decided that the residency requirement passed constitutional muster.

The *Stalland* court distinguished the *Wilson* decision on two grounds. First, the court indicated that *Wilson* had been decided before the Supreme Court's decision in *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978). The court reasoned that *Hicklin's* reappraisal of the privileges and immunities clause minimized any impact of the *Wilson* case as precedent. Secondly, the *Stalland* court concluded that the Supreme Court had not

reached the privileges and immunities clause challenge in their decision. The *Stalland* court wrote:

> Too often the Supreme Court has explained that the precedential effect of a summary affirmance is limited and can extend no farther than the precise issues presented and necessarily decided by those actions. *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977). A summary disposition affirms only the judgment of the court below, *Fusari* v. *Steinberg*, 419 U.S. 379, 391-392 (1975), and "no more may be read into [the court's] action than was essential to sustain that judgment. *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 183 (1979). Since the district court in *Wilson* did not mention the privileges and immunities clause, the precise issue now before this Court was neither adequately presented to nor necessarily decided by the Supreme Court. Although the *Wilson* court considered an applicant's right to travel, that right is not based upon any particular constitutional provision. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). A decision based upon the right to travel, therefore, should not be deemed determinative of issues narrowly raised under article IV, § 2.12.

Slip Opinion at 14, 15.

As the *Stalland* court indicated, the exact precedential effect of a summary disposition by the Supreme Court is open to some question. The doctrine as evolved diametrically since its earlier pronouncement in *Hicks* v. *Miranda*, 422 U.S. 332 (1975), through *Illinois Elections Board* v. *Socialist Workers Party*, 440 U.S. 173 (1979). The court indicated in *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977):

> Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below.
>
> "When we summarily affirm, without opinion, . . . we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument." (Footnote omitted.) *Fusari* v. *Steinberg*, 419 U.S. 379, 391-392 (1976) (Burger, C.J., concurring).
>
> Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.

That the summary affirmance affirms the judgment of the lower court, and not its rationale, in relation to the federal issues raised below was reasserted in *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 477 (1979).

> Our summary dismissals are, of course, to be taken as rulings on the merits, *Hicks* v. *Miranda*, 422 U.S. 332, 343-345, in the sense that they rejected the "specific challenges presented in the statement of jurisdiction" and left "undisturbed the judgment appealed from." *Mandel* v. *Bradley*, 432 U.S. 173, 176. They do not, however, have the same precedential value here as does an opinion of this Court after briefing and oral argument on the merits, *Edelman* v. *Jordan*, 415 U.S. 651, 670-671; *Richardson* v. *Ramirez*, 418 U.S. 24, 53. A summary dismissal of an appeal represents no more than a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision. It does not, as we have continued to stress, see, e.g. *Mandel* v. *Bradley*, *supra*, necessarily reflect our agreement with the opinion of the court whose judgment is appealed. It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action. *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 309 n.1; *Usery* v. Turner *Elkhorn Mining Co.*, 428 U.S. 1.

The summary affirmance does not decide the issues presented by the appellant's jurisdictional statement; rather it decides whether the "specific challenges presented" are of such moment as to upset the lower court's judgment. As the 6th

Circuit stated in *Anderson* v. *Celebrezze*, 664 F.2d 554, 558-559 (6th Cir. 1981):

> In light of the narrow effect to be given summary dispositions, appellant has construed the quoted sentence from Mandel too literally. The Supreme Court was not holding that a summary affirmance decides every issue raised in the jurisdictional statement, but that on the narrow facts before the Court the issues raised in the jurisdictional statement did not warrant the relief sought. To hold otherwise would permit parties appealing cases to the Supreme Court to control the precedential effect of a summary action by the way they structure their jurisdictional statement.

Finally, the court notes that where there has been a doctrinal change since the summary affirmance, the affirmation is no longer mandatory precedent. *Hicks* v. *Miranda*, *supra* at 344-345; *Lecates* v. *Justice of Peace Court No. 4*, 637 F.2d 898, 902, 904 (3rd Cir. 1980). We turn to the federal questions and decision of the District Court and Jurisdictional Statement to the Supreme Court in *Wilson*.

The narrow and precise holding of *Wilson* is that the requirement of a statement of intent to reside does not violate Mr. Wilson's right to travel, the Equal Protection Clause, or the Due Process Clause. The *Wilson* court did not decide whether a state may constitutionally require residence, it assumed arguendo that the state could. The court wrote.

> With the case in its present posture, we emphasize that plaintiff does not, indeed cannot, challenge the requirement of O.R.S. § 9.220 (1) that he be a citizen of Oregon at the time of admission to practice.
>
> . . . . . .
>
> In this case, however, we are concerned only with the requirement that an applicant express an intent to be an Oregon resident at the time of admission.

416 F. Supp. at 987. The court limited its decision to the statement of intent because Mr. Wilson did not have standing to contest the residence requirement. His application had been denied for failing to sign the statement of intent. The issue,

then was: assuming a valid rule, does requiring a statement of intent to comply with that rule violate the constitution? The *Wilson* court said no.

Although the court's rationale is not binding under the *Mandel* and *Yuokima Indian Nation* decisions, it is pertinent here in that it reinforces the narrowness of the *Wilson* ruling. The district court based its decision on two grounds. First, it noted that the statement of intent requirement did not factually implicate the plaintiff's right to travel; he remained "free to live and travel wherever he [chose] prior to admission to the bar." 416 F. Supp. at 988. As there was no discrimination, there was no need to determine whether a "peculiar source of evil" justified a rule reasonably related to that evil. *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978). There was factually no violation of this privilege and immunities clause. The second reason asserted is that a state has a legitimate interest ". . . in processing only those bar applicants submitted by persons likely to meet admissions requirements." 416 F. Supp. at 988. An applicant who states he is not going to abide by the Supreme Court and Board of Governor rules need not be carried fruitlessly through the application process. His application may be denied at whatever stage it appears he is disqualified to be admitted. Minimizing the administrative and investigative workload is a legitimate state interest satisfying the equal protection and due process clauses. As the intention requirement violated neither the right to travel nor the 14th Amendment, the court awarded judgment in favor of defendants.

In contrast to this narrow holding below, Mr. Wilson on appeal phrased his jurisdictional statement very broadly to raise issues not addressed by the district court. He questioned the residency requirement at the time of admission and also the continued residency requirement which operated to disbar an attorney who moves away after being admitted. 45 L.W. 3545. The district court did not address the first question because of a lack of standing. More significantly, the second question was not raised below at all. If, as defendants contend, the summary affirmance is a judgment on the merits as to the first question,

it necessarily follows that the Supreme Court reached the merits of the second also. The court rejects this construction of the Supreme Court's decision. The questions in the jurisdictional statement may not be considered in a vacuum; their true import is in relation to the decision and questions below. The significance of the affirmance is that the appellant is not entitled to the relief sought based upon these challenges. *Mandel* v. *Bradley*, *supra*; *Anderson* v. *Celebrezze*, *supra*. As the holding of the court below on the residence requirement is that the plaintiff did not have standing, the Supreme Court's summary decision affirms only that holding. It does not reach the merits of the residency requirement. Accordingly, the court finds itself unhindered in the case at bar by the *Wilson* decision.

Whether or not *Hicklin* v. *Orbeck* has done away with the fundamental right analysis of *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U.S. 371 (1978), as defendants suggest, the issue is a red herring. *Cf. Hawaii Boating Ass'n* v. *Water Transp. Facilities*, 651 F.2d 661, 667 (9th Cir. 1981). Whether it is anachronistic or not, this court aligns itself with those courts who have considered the practice of law a learned profession. Although there are other professions that provide charitable services, the law is the only one to recognize pro bono work as an obligation of the profession. Attorneys maintain a position unique among fiduciaries in that while zealously guarding their trust to their employer, they are never allowed to forget their obligations to the public and to the courts that hold them officers. An individual assuming the position of attorney not only takes up his trade, but assumes a posture in the administration of justice so vital that in criminal matters, the constitution mandates that society pay the cost when the client cannot. But whether or not the office of attorney is above trade or mere livelihood it is clearly within the ambit of the Privileges and Immunities Clause under the *Baldwin* analysis. 436 U.S. 378-383.

Of greater import here is whether the traditional deference afforded the states in governing the practice of law amounts to

an exception to coverage of the constitutional provisions here invoked. Earlier decisions of the Supreme Court indicated one such exception where the discrimination involved the state ownership of natural resources. In *McCready* v. *Virginia*, 94 U.S. 391 (1876), the court upheld a Virginia statute that allowed residents to plant oysters in tidal waters of the Ware river, but not citizens of other states. The court took up this wildlife exception again in *Toomer* v. *Witzell*, 334 U.S. 385 (1948), indicating some skepticism for the conceptualization of the *McCready* rule as an exception, and further indicating that if an exception, then it should not be expanded. The conceptualization was laid to rest in *Baldwin* v. *Montana Fish and Game Comm'n*, *supra* at 385-387, the court stating that the ownership interest is not absolute. *Hicklin* reaffirmed this, stating that the fact of ownership by the state "is a factor—although often the crucial factor—to be considered in evaluating whether the statute's discrimination against nonresidents violates the clause." 437 U.S. at 529. In an analogous vein, the Supreme Court has not considered the traditional deference to create an exception to the Due Process Clause of the Fourteenth Amendment, *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957); *Law Students Research Council* v. *Wadmond*, 401 U.S. 154, 162 (1971); *Leis* v. *Flynt*, 439 U.S. 438 (1979), (Stevens, J. dissenting), nor the Equal Protection Clause of the Fourteenth Amendment, *In re Griffiths*, 413 U.S. 717 (1973), nor the Speech Clause of the First Amendment, *Law Students Research Council* v. *Wadmond*, *supra*; *Baird* v. *State Bar of Arizona*, 401 U.S. 1 (1971); *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). The court concludes that it does not constitute an exception to the Privileges and Immunities Clause either, but rather is a factor to be considered in evaluating whether the rule violates the clause.

Both parties concur that the standard for review of an Article 10, § 2 challenge is to be found in the Supreme Court's most recent application of the Privilege and Immunities Clause in *Hicklin* v. *Orbeck*, *supra*. That case involved an attack upon the constitutionality of an Alaskan statute giving residential

reference in oil and gas pipeline employment. The court found support for appellant's position in *Ward* v. *Maryland*, 12 Wall 418 (1871), (licensing of nonresident merchants), and *Toomer* v. *Witzell*, 334 U.S. 385 (1948), (non-resident shrimping license 100 times that of resident). The court cited *Toomer* and *Mullaney* v. *Anderson*, 342 U.S. 415 (1952), to require a two-step analytical framework. The first enquiry is whether there is a substantial reason for the discrimination beyond residence. This is also stated as a requirement of a showing that the non-residents "constitute a peculiar source of the evil" the state seeks to address. 437 U.S. at 525-526. The second enquiry is whether there is a reasonable relationship between the means chosen and the end desired. The relationship must be "substantial", ibid. at 527, and the means selected "closely tailored" to meet the purpose. Ibid. at 528. We turn to an application of this standard to the defendant's justifications.

Defendant's brief advances three "evils" that it would remedy by the discrimination. Defendants contend that

> The "peculiar evil" at which Supreme Court Rule 42 is addressed is that non-residents of the State of New Hampshire, who wish to become members of the bar, will not be sufficiently committed to practicing law in the State of New Hampshire in order to (1) learn local practices and rules; (2) be conscious of developing a good reputation in a relatively small legal community; (3) be available for court proceedings and similarly, subject to disciplinary action by the court.

Defendant's memorandum at 8, 9. All of these reasons fall within constitutionally permissible concerns of "good moral character or proficiency in [the] law." *Schware* v. *Board of Bar Examiners*, *supra*, at 239. But that is insufficient to satisfy the first leg of the *Hicklin* standard; the fact of non-residence must be the "peculiar source" of ignorance of local practices, disregard for reputation, and unavailability for court. The *Hicklin* court explained that the evil sought to be remedied there was a uniquely high level of unemployment. As the employment was due to lack of education and training among the large

Eskimo and Indian populations and not the influx of non-residents, the non-residents were not the peculiar source of the unemployment. 437 U.S. at 526. The analogy to the instant action is compelling. If, as defendants contend, "practicing law within this state is the best method of ensuring familiarity with local rules and practice", then it is not non-resident applicants, but all applicants, that are the peculiar source of ignorance of the rules. Defendants contend that the residency requirement applies to all applicants and therefore does not run afoul of the privileges and immunities clause. This simplistic argument ignores the impact of the rule; although the residency requirement facially applies to all applicants, the discrimination it works only effects nonresident applicants. *See*, *Gordon* v. *Committee on Character and Fitness*, 397 N.E. 2d 1309, 1312-1313 (N.Y. App. 1979). Similarly, regard for the good reputation of the attorney and the bar generally is a function of where an individual's heart is, not where her house is. Availability for court proceedings depends on geographical distance, not jurisdictional boundaries. There are very few states whose configurations are such that all residents of the state are closer to the state courts than all non-residents. New Hampshire is a good example of the opposite; there are areas of the contiguous states closer to the New Hampshire Supreme Court's situs in Concord as the crow flies than is the northern third of the state. Plaintiff here is as available to the state courts as any of the 269 non-resident members of the New Hampshire Bar Association. Finally, it cannot be seriously contended that the state boundary poses a significant obstacle to disciplining an out-of-state attorney for her in-state actions. *See*, *Roy* v. *Transairco*, 112 N.H. 171, 173 (1972), (New Hampshire Long Arm Statute extends to limits of Due Process Clause.) In brief, the fact of plaintiff's non-residence is not the source of any of the evils defendants indicate their rule would remedy. Defendants have failed to satisfy the first requirement of the *Hicklin* v. *Orbeck* analytical framework.

Although the above ruling is dispositive, we proceed with the second *Hicklin* inquiry because it supports a decision that

Rule 42(3) violates the Privileges and Immunities Clause. In *Hicklin*, the Supreme Court indicated that the Alaska Hire statute did not bear a substantial relationship to alleviating unemployment because it favored those individuals who would never qualify and those individuals already qualified as well as the individuals it sought to favor—those unemployed individuals becoming qualified. The Alaska Hire statute failed to satisfy the second stage of the inquiry because it was not closely tailored to promoting the employment of those individuals who sought but had not yet obtained pipeline employment.

Assuming arguendo that non-resident applicants are the peculiar source of ignorance of local rules and practice, the fit of the means adapted is particularly ill-suited. The defendants argue that the residency requirement is a committment by the applicant that he or she will be a resident at the time of admission. Residents at the time of admission are more apt to remain residents after admission. Residents after admission are more apt to practice law in the state. Those practicing law in New Hampshire will become familiar with New Hampshire local rules and practice. This rather attenuated logical equation falls prey to the same infirmity as the Alaska Hire statute; it favors resident admittees who do not intend to practice law, or who move from New Hampshire prior to practicing law, at the expense of non-resident admittees who would actively practice law in New Hampshire. Thus the bar of non-resident applicants is not closely tailored to achieving familiarity with local rules and practices. There are other, less intructive means to meet this end, such as testing local rules on the bar examination, requiring admittees to attend a practical skills course, or a program of linking long-time members of the bar with new admittees, all of which New Hampshire has implemented. These programs are exemplary; as defendants point out, they establish a higher standard to be met by applicants to the New Hampshire Bar. But the outer limits of this higher standard and additional qualifications is the Constitution. We quote from *Golden* v. *State Board of Bar Examiners*,

452 F. Supp. 1082, 1087 (D. Md. 1978), a case decided three months prior to *Hicklin* v. *Orbeck*[1] that upheld a residence requirement:

> The "local custom" theory and the "roots in the community" theory are unpersuasive. Indeed, the majority opinion does not rest its decision on either of these theories. Moreover, all of the cases dealng with residency requirements for admission to the bar have considered these theories and uniformly found them to be without merit. *Keenan* v. *Board of Law Examiners*, D.C., 317 F. Supp. 1350, 1359-1361 (1970); *Webster* v. *Wofford*, D.C. 321 F. Supp. 1259, 1261-1262 (1970); *Lipman* v. *Van Zant*, D.C., 329 F. Supp. 391, 400-401 (1971); *Potts* v. *Honorable Justices of Supreme Court of Hawaii*, D.C., 332 F. Supp. 1392, 1397-1398 (1971).

Barring non-residents is also an overbroad means of assuring that attorneys are available for court or amenable to disciplinary proceedings. The New Hampshire courts, both state and federal, have rules pertaining to the appearance of counsel pro hac vice. Both bar non-resident counsel unless a member of the New Hampshire bar has appeared and is present in court.

> *New Hampshire Supreme Court Rule 19.* An attorney, who is not a member of the Bar of this State, shall not be allowed to engage in the trial or hearing in any case, except on motion which will not ordinarily be granted

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[1] Defendants have cited numerous cases decided prior to *Hicklin* v. *Orbeck* upholding bar residency requirements as persuasive precedent here. Plaintiff contends that those cases are no longer persuasive because of the change of the law in *Hicklin*. Defendants in turn argue that *Hicklin* is not a change of the law, but a mere restatement, and therefore still persuasive. The answer to this dialogue may be found in *Consumers Union of U.S., Inc.* v. *Heimann*, 427 F. Supp. 840, 845 (S.D.N.Y. 1977), vacated and remanded for further consideration in light of *Hicklin* v. *Orbeck*, 438 U.S. 901 (1978). The District Court there relied upon an exhaustive discussion of the *Toomer* decision. If the Supreme Court did not view *Hicklin* as a departure from *Toomer*, this court is candidly at a loss to explain *Heimann*.

unless a member of the Bar of this State is associated with him and present at the trial or hearing.

United States District Court of New Hampshire Rule 5(b)
Any attorney who is a member in good standing of the bar of any court of the United States or of the Highest court of any state may at the discretion of the court, on motion by a member of the bar of this court who is actively associated with him in a particular action, be permitted to practice before this court in that action. The court may at any time for good cause revoke such permission without hearing. An attorney so permitted to practice before this court in a particular action shall at all times have associated with him in such action a member of the bar of this court, upon whom all process, notices and other papers may be served and who shall sign all papers filed with the court and whose attendance shall be required at all proceedings unless excused by the court.

These rules have been efficacious in ensuring the required decorum in both courts and have sometimes not been strictly adhered to where visiting counsel have demonstrated by past performance his or her integrity and willingness to abide by the rules of New Hampshire trial practice. There are members of the New Hampshire bar who practiced in New Hampshire and who subsequently have moved to Massachusetts yet regularly appear in New Hampshire court without the requirement of local counsel. There also are members of the Massachusetts Bar who are not members of the New Hampshire Bar but who appear frequently in state and federal court and comport themselves in court with professional dignity. Unfortunately, there are certain members of the Maine and Massachusetts Bar who conduct themselves in an untoward manner as far as professional conduct is concerned. Having served sixteen years as a New Hampshire Superior Court Judge and more than three years as a federal judge, this court states from experience there was little that could be done about this conduct except in the immediate case before the court that they were involved in. They would appear in another of the state's counties and as New Hampshire Superior Court Judges are on circuit, wait until the judge changed circuits and reappear. In short, a review of those non-resident attorneys appearing in

New Hampshire Courts, either as members of the bar or pro hac vice, indicates that residence is not substantially related to in-court conduct or availability. There are methods more closely tailored to this evil from which to choose. *See, Stalland* v. *South Dakota Board of Bar Examiners*, slip opinion at 11, 12; *Gordon* v. *Committee on Character and Fitness, supra*, 1314 (N.Y.App. 1979).

The plaintiff in this case lives in the contiguous State of Vermont, is a member of the Vermont Bar, lives less than a quarter mile from the Vermont-New Hampshire border and may readily, if necessary, be subject to discipline if she were to violate any New Hampshire rules. She is similarly available for pro bono cases.

The court is not intimating that the plaintiff is a trouble maker, to the contrary her credentials are impeccable. The point is that she would be directly responsible for her actions as a member of the bar.

Having found that non-resident applicants are not the peculiar source of the evils the defendants indicate they are seeking to address, and having further found that the means selected do not bear a substantial relationship to the evils defendants have shown in justification, the court concludes that the residency requirement fails to comply with Article 4, § 2, cl. 1. The enquiry need go not further. Defendants are enjoined from enforcing the residency requirement of N.H.S.Ct. R. 42(3). No costs. Plaintiff's request for attorneys fees is denied.

SO ORDERED.

May 17, 1982

Martin F. Loughlin
MARTIN F. LOUGHLIN
U.S. District Judge

Jon Meyer, Esq.
Office of the Attorney General

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Civil Action No. 82-135-L

KATHRYN A. PIPER

v.

SUPREME COURT OF NEW HAMPSHIRE;
JOHN W. KING, MAURICE P. BOIS,
CHARLES G. DOUGLAS, III, DAVID A. BROCK,
WILLIAM F. BATCHELDER, all Justices of the
Supreme Court of New Hampshire;

and

RALPH H. WOOD, Clerk of the
Supreme Court of New Hampshire

JUDGMENT

In accordance with the ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT by the Honorable Martin F. Loughlin, United States District Judge, dated May 17, 1982, judgment is hereby entered.

By the Court,

?????
Clerk

May 18, 1982

cc: Jon Meyer, Esq.
Gregory H. Smith, Esq.
Martha V. Gordon, Esq.

APPENDIX H

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1548

KATHRYN A. PIPER
Plaintiff, Appellee

v.

SUPREME COURT OF NEW HAMPSHIRE,
Defendant, Appellant

FILED
IN CLERK'S OFFICE
DEC. 27 10:01 AM '83
US COURT OF APPEALS
FOR THE FIRST CIRCUIT

NOTICE OF APPEAL

The Supreme Court of New Hampshire, defendant, appellant, hereby appeals to the Supreme Court of the United States from the decision of the United States Court of Appeals For The First Circuit, dated December 5, 1983, in which the decision of the District Court was affirmed by an equally divided vote of the Court of Appeals, en banc.

SUPREME COURT OF NEW HAMPSHIRE

By Martin L. Gross, Esquire
MARTIN L. GROSS, ESQUIRE
Martha V. Gordon, Esquire
Gregory H. Smith, Attorney General

December 22, 1983

APPENDIX I

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1548

KATHRYN A. PIPER
Plaintiff, Appellee

v.

SUPREME COURT OF NEW HAMPSHIRE,
Defendant, Appellant

FILED
JAN. 9 3:30 PM '84
US COURT OF APPEALS
FOR THE FIRST CIRCUIT

AMENDED NOTICE OF APPEAL

The Supreme Court of New Hampshire, defendant, appellant, hereby appeals to the Supreme Court of the United States from the decision of the United States Court of Appeals for the First Circuit, dated December 5, 1983, in which the decision of the District Court was affirmed by an equally divided vote of the Court of Appeals, en banc. Appeal is taken pursuant to 28 U.S.C. § 1254(2).

SUPREME COURT OF NEW HAMPSHIRE

By Martin L. Gross, Esquire
MARTIN L. GROSS, ESQUIRE
Martha V. Gordon, Esquire
Gregory H. Smith, Attorney General

January 6, 1984

I certify that I have this day mailed a copy of the within Amended Notice of Appeal to Jon Meyer, Esquire.

Martin L. Gross
MARTIN L. GROSS

January 6, 1984

MOTION

(2)

No. 83-1466.

Supreme Court, U.S.
FILED
APR 5 1984
ALEXANDER L. STEVAS
CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

SUPREME COURT OF NEW HAMPSHIRE,
PLAINTIFF-APPELLANT,

v.

KATHRYN A. PIPER,
DEFENDANT-APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Motion to Affirm.

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Question Presented.

Whether the exclusion of appellee, a resident of Vermont, from the New Hampshire Bar solely on the basis of a residency rule which requires in-state home residence at the time of admission to the Bar violates her rights under the privileges and immunities clause of the United States Constitution.

Table of Contents.

Constitutional and statutory provisions	2
Argument	3
I. Introduction	3
II. The legal standards applicable to this case have been clearly established in the prior opinions of this court	4
III. The New Hampshire bar residency rule entirely fails to meet the controlling standards of this court	8
Conclusion	12

Table of Authorities Cited.

Cases.

Ambach v. Norwick, 441 U.S. 68 (1979)	6
Austin v. New Hampshire, 420 U.S. 656 (1975)	6
Bates v. State Bar of Arizona, 433 U.S. 350 (1977)	5, 7
Bradwell v. The State, 83 U.S. (16 Wall.) 130 (1873)	5
Doe v. Bolton, 410 U.S. 179 (1973)	4
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)	5
Hicklin v. Orbeck, 437 U.S. 518 (1978)	3, 4, 7, 9
In Re Griffiths, 413 U.S. 717 (1973)	3, 6, 7, 8n
In re Jadd, 391 Mass. 227 (1984)	3, 7, 9, 10
In Re Lockwood, 154 U.S. 116 (1894)	5
Matter of Gordon, 48 N.Y.2d 266 (1979)	3, 7, 10
Noll v. Alaska Bar Ass'n, 649 P.2d 241 (Ak. 1982)	3, 7
Paul v. Virginia, 8 Wall. 168 (1868)	4
Schware v. Board of Bar Examiners, 353 U.S. 232 (1957)	7

Sheley v. Alaska Bar Association, 620 P.2d 640 (Ak. 1980) 3
Sargus v. West Virginia Bd. of Law Examiners, 294 S.E. 2d 440 (W. Va. 1982) 3, 7, 10
Stalland v. South Dakota Bd. of Bar Examiners, 530 F. Supp. 155 (D.S.D. 1982) 3
Strauss v. Alabama State Bar, 520 F.Supp. 183 (N.D. Ala. 1981) 3
Toomer v. Witsell, 334 U.S. 385 (1948) 4
United Building and Construction Trades Council of Camden v. Mayor and Council of Camden, 52 U.S.L.W. 4187 (U.S. Feb. 21, 1984) 4

CONSTITUTIONAL AND STATUTORY PROVISIONS.

United States Constitution
Article IV 2, 3, 4, 5, 6 et seq.
§ 2 2
Supreme Court Rules
Rule 16 1
New Hampshire Supreme Court Rules
Rule 37(1)(a) 2, 10n
Rule 42(3) 2
New Hampshire RSA 510:4 (1983) 2, 10n

No. 83-1466.

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

SUPREME COURT OF NEW HAMPSHIRE,
PLAINTIFF-APPELLANT,

v.

KATHRYN A. PIPER,
DEFENDANT-APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Motion to Affirm.

Appellee, Kathryn A. Piper, moves pursuant to Rule 16 of the Rules of this Court for an order affirming the decision of the district court appealed from in the jurisdictional statement of the Supreme Court of New Hampshire on the grounds that the jurisdictional statement does not present a substantial federal question and the district court decision is in accord with the clear standards formulated by this Court and the recent decisions of other courts, state and federal, which have considered the same issue.

Constitutional and Statutory Provisions.

The privileges and immunities clause, article IV, § 2 of the United States Constitution, provides in pertinent part:

> the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

New Hampshire Supreme Court Rule 42(3) provides:

> Any person domiciled in the United States and who either is a resident of the State of New Hampshire or files a statement of intention to reside in the State of New Hampshire shall be eligible to apply for examination provided he is of the qualifications hereinafter provided.

New Hampshire Supreme Court Rule 37(1)(a) provides in pertinent part:

> Any attorney admitted to practice law in this State or any attorneys specially admitted to practice by a court of this State is subject to the disciplinary jurisdiction of this court and the committee on professional conduct as hereinafter defined.

New Hampshire RSA 510:4 provides in pertinent part:

> Any person who is not an inhabitant of this state and who, in person or through an agent, transacts any business within this state, commits a tortious act within this state, or has the ownership, use, or possession of any real or personal property situated in this state submits himself, or his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from or growing out of the acts enumerated above.

Argument.

I. INTRODUCTION.

The question raised by this appeal is whether the Supreme Court of New Hampshire can exclude appellee from membership in the bar of New Hampshire because her home residence is just beyond the state line notwithstanding the fact that she has met all the other requirements for admission to the bar. Although this precise question has never been decided by this Court, virtually all the state and federal courts that have faced it in the wake of this Court's decision in *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978) have ruled that a residency requirement for bar admission violates the privileges and immunities clause of article IV to the Constitution. *In re Judd*, 391 Mass. 227 (1984); *Noll* v. *Alaska Bar Ass'n*, 649 P.2d 241 (Ak. 1982); *Sargus* v. *West Virginia Bd. of Law Examiners*, 294 S.E.2d 440 (W. Va. 1982); *Stalland* v. *South Dakota Bd. of Bar Examiners*, 530 F.Supp. 155 (D.S.D. 1982); *Strauss* v. *Alabama State Bar*, 520 F.Supp. 173 (N.D. Ala. 1981); *Sheley* v. *Alaska Bar Association*, 620 P.2d 640 (Ak. 1980); *Matter of Gordon*, 48 N.Y.2d 266 (1979). In an analogous context under the equal protection clause, this Court has held that a state cannot exclude bar applicants solely by reason of their nationality. *In Re Griffiths*, 413 U.S. 717 (1973).

Appellants suggest that there is a substantial conflict between the line of cases under *Hicklin* and those cases holding that state bars are entitled to substantial deference in setting admission requirements. Clearly read, however, both lines are consistent. Although this Court has deferred to state authorities in determining what are reasonable admission standards, it has never intimated that that discretion accorded the state courts in any way dilutes the constitutional rights of bar applicants. It is these rights which are at issue in this case.

II. The Legal Standards Applicable to This Case have been Clearly Established in the Prior Opinions of This Court.

This Court has clearly articulated the principle that where a state discriminates against nonresidents by reason of their nonresidency with respect to matters of fundamental concern such as their right to pursue a common calling or profession, then the state must establish that nonresidents are the source of a "peculiar evil" and that the discriminatory measure bears a close and reasonable relationship to the problem it is alleged to address. *Toomer* v. *Witsell*, 334 U.S. 385, 395 (1948); *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978); *United Building and Construction Trades Council of Camden* v. *Mayor and Council of Camden*, 52 U.S.L.W. 4187 (U.S. Feb. 21, 1984).

Appellants attempt to avoid this standard by asserting that it was only intended to cover economic discrimination and that the bar residency rule is not an economic regulation. Their position, however, fundamentally misconceives the nature of the privileges and immunities clause of article IV. This Court has made it clear that that clause is intended to protect against discrimination on matters "of fundamental concern," not just those that affect interstate commerce. *United Building Construction Trades Council of Camden* v. *Mayor and Council of Camden*, 52 U.S.L.W. at 4191. Its purpose goes well beyond the protection against economic regulation. Rather it is intended "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *United Building and Construction Trades Council of Camden* v. *Mayor and Council of Camden*, 52 U.S.L.W. at 4189, *quoting from Paul* v. *Virginia*, 8 Wall. 168, 180 (1868). Thus in *Doe* v. *Bolton*, 410 U.S. 179, 200 (1973), this Court held that "[j]ust as the Privileges and Immunities Clause, Const. Art. IV, § 2, protects persons who

enter other States to ply their trade, . . . so must it protect persons who enter Georgia seeking the medical services that are available there."

Appellants' position also neglects the reality that attorneys earn a livelihood practicing law and that regulations that limit the right to practice have pronounced economic consequences. This Court has expressly rejected the claim that lawyers are "somehow 'above' trade," *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 371-72 (1977) and has noted that "in the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, ..." *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 788 (1975). The most tangible consequence of the New Hampshire residency rule is to insulate attorneys admitted to the New Hampshire bar from competition from attorneys who have not established New Hampshire residency. By the same token, it limits the choice for the consumers of legal services on the basis of a criterion which has no relationship to the fitness of an individual attorney to practice in New Hampshire.

Appellants rely upon this Court's decisions in *In Re Lockwood*, 154 U.S. 116 (1894) and *Bradwell* v. *The State*, 83 U.S. (16 Wall.) 130 (1873). But even were the holdings in those decisions—that women do not have a constitutional right to be admitted to the bar—still good law, neither opinion has any bearing on the issues in this case. In the *Bradwell* case, the stated facts indicate that the applicant was a resident of Illinois applying to practice in Illinois. The question before the Court thus was not whether a state could discriminate against out-of-state residents in bar admission but whether it could discriminate against a certain class of in-state residents. Thus plaintiff's counsel expressly relied upon the privileges and immunities clause of the fourteenth amendment as contrasted to that contained in article IV, 83 U.S. at 133, and the Court based its ruling solely upon the fourteenth amendment. The *Lockwood* opinion is slightly more ambiguous because it gives no information as to the applicant's residence but there is

nothing in the opinion to indicate that she did not reside in the jurisdiction to which she was applying or that that jurisdiction discriminated against out-of-staters any differently than it discriminated against in-state applicants. Accordingly, there was no occasion for the Court to rule on the applicant's rights under article IV.

Appellants also suggest that bar admission standards should be exempt from constitutional scrutiny because the practice of law is related to the governmental function of administering justice. However, in a line of cases under the Equal Protection Clause this Court has rejected the contention that the bar's claimed governmental function permits the exclusion of aliens from the legal profession. *In Re Griffiths*, 413 U.S. 717 (1973); *Ambach* v. *Norwick*, 441 U.S. 68, 75 (1979). The holding and reasoning of those decisions make clear that the governmental function defense cannot insulate from constitutional review requirements applying to all bar applicants.

Appellants argue in the alternative that even if the privileges and immunities clause applies that this Court should as a matter of federalism adopt a more relaxed standard of review. However, there is absolutely no precedent in the decided cases for adopting differential standards of review under the privileges and immunities clause. To the contrary this Court has invariably applied the same standard even in areas where the states are traditionally accorded broad discretion.

In *Austin* v. *New Hampshire*, 420 U.S. 656 (1975), this Court declined to relax its standard of review under the privileges and immunities clause with respect to a state commuter tax imposed on out-of-state residents although it acknowledged the broad discretion generally accorded state legislatures in the area of taxation. Instead it reaffirmed that it had a special obligation to impose a "substantially more rigorous" standard of review in order to protect the integrity of the privileges and immunities clause and the values it embodies. 420 U.S. at 661-662.

This Court, in considering the rights of bar applicants under other constitutional provisions, has consistently held that they are entitled to the same standard of review as is customarily followed with respect to the right asserted. *See e.g., In Re Griffiths*, 413 U.S. 717 (1973) (equal protection clause); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957) (Due Process Clause); *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 371-72 (1977) (first amendment). No valid reason has been advanced why a privileges and immunities claim should be treated differently.

The *Hicklin* standard already gives appellants sufficient leeway to protect their legitimate concerns. But it requires far more than the conclusory invocation of these concerns to justify the total exclusion of nonresidents.

Appellants' assertion of the federalism defense fundamentally misapprehends the issues in this case. The question is not whether the State Supreme Court has the right to establish standards and rules relative to the admission and regulation of attorneys and should be accorded substantial discretion in so doing. That right has never been challenged. Nor is there any claim that federal authorities should take over any of the powers that belong to the states. The sole issue is whether appellants have the right to establish a rule for admission that violates the explicit command of the privileges and immunities clause.

The only federal involvement in this case is that appellee sought to vindicate her federal constitutional right in federal court. The same type of claim has also been filed in the highest state courts in Massachusetts, New York, West Virginia and Alaska and all four have held as a matter of federal constitutional law that a residency requirement for bar admission is unconstitutional. *In re Judd*, 391 Mass. 227 (1984); *Matter of Gordon*, 48 N.Y.2d 266 (1979); *Sargus* v. *West Virginia Bd. of Law Examiners*, 294 S.E.2d 440 (W. Va. 1982); *Noll* v. *Alaska Bar Ass'n*, 649 P.2d 241 (Ak. 1982). To adopt appellants' position that the decision of each state court should not be subject to federal constitutional review would

mean that the rights of bar applicants under the privileges and immunities clause would vary depending upon the state in which they made application.

Appellants' contention that the district court decision mandates the establishment of a national bar is fallacious. Nothing in that opinion prevents the appropriate authority in each state from establishing its own entrance requirements for admission to the bar of that state and requiring that they be adhered to with the sole limitation that such requirements cannot abridge the privileges and immunities clause.

III. The New Hampshire Bar Residency Rule Entirely Fails to Meet the Controlling Standards of This Court.

Although a hearing was held in district court, appellants failed to provide any evidence that nonresident applicants to the New Hampshire Bar constitute a "peculiar evil" or that the New Hampshire residency requirement in any way contributes to the resolution of the alleged evils. The only testimony submitted that in any way related to these points was a conclusory affidavit by the Chief Justice stating that nonresidents could not be expected to support the New Hampshire Constitution,[1] that resident applicants are more likely to become familiar with the laws and rules of New Hampshire and are more concerned about their reputation in the legal community, and that the residency requirement would make it more likely that all attorneys are available for court appearance and disciplinary proceedings and would share in the Bar's pro

[1] Appellants have subsequently downplayed this point since it was explicitly rejected with respect to an alien applicant to the bar by this Court in the case of *In Re Griffiths*, *supra* at 717.

bono obligations.[6] Despite the fact that these rationales have been consistently rejected in the opinions of the other state and federal courts that have recently examined the need for a residency requirement, appellants failed to offer a scintilla of evidence to establish that out-of-state applicants would be deficient in any of these areas if admitted or that the residency requirement addresses the alleged problems.

Contrary to appellants' claim that the district court applied a standard of strict scrutiny, Judge Loughlin explicitly took into account the deference normally accorded the state court in setting admissions standards (App. 63a), and provided appellants considerable leeway. Nevertheless, he concluded that their submission entirely failed to satisfy the standards set forth in *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978). First he found that they had failed to make a showing that the evils they alleged had any connection to whether the attorney had an in-state residence. Secondly, the Court determined that even if a nonresident attorney did present a "peculiar evil" that the New Hampshire residency rule does not address the alleged problem because it only applies to applicants rather than admitted attorneys. Finally, he noted other ways in which the alleged evils could and were being addressed which would not necessitate the exclusion of nonresident applicants.

In a recent unanimous decision the Massachusetts Supreme Judicial Court, in a challenge to that court's residency requirement for attorneys admitted by motion, reached the same conclusions as the district court. *In re Judd*, 391 Mass. 227 (1984). The court ruled that there had been no showing that nonresident applicants constituted a "peculiar source" of any evil and that "it is not apparent that residency is a measure of familiarity with local practice or of the willingness of an attorney to learn local procedure." *Id.* at 234. The court also noted as did the district court in this action that

[6] The affidavit is set forth in the district court's opinion. Appendix to Appellants' Jurisdictional Statement (hereinafter cited as (App.)) at 54a-56a.

there is absolutely no jurisdictional bar against disciplining nonresident attorneys.[5] Finally, the court pointed out a host of less restrictive alternatives which could be used to address the alleged evils if they had any basis in fact.

The argument in favor of the New Hampshire rule is even weaker than the rule invalidated in *Judd* because attorneys admitted by motion in Massachusetts are not required to take an exam on local law while applicants to the New Hampshire Bar must demonstrate their knowledge of New Hampshire law by passing an examination prior to being admitted. All the other state courts that have formally addressed the question in recent years have determined that the additional requirement of residency does not serve any useful purpose. *Matter of Gordon*, 48 N.Y.2d 266 (1979); *Sargus* v. *West Virginia Bd. of Law Examiners*, 294 S.E.2d 440 (W. Va. 1982); *Noll* v. *Alaska Bar Ass'n*, 649 P.2d 241 (Ak. 1982).

Even were it true that nonresident attorneys present difficulties not equally present in resident practitioners, that would still fail to fortify the New Hampshire rule because that rule as interpreted by appellant applies solely to applicants for the bar and not to attorneys already admitted. At no stage of these proceedings have appellants been able to explain why the rule applies exclusively to applicants when every one of their alleged justifications is only pertinent to attorneys already admitted. Their assertion that requiring residency at the time of admission will have the effect of making attorneys more likely to participate in voluntary activities and be subject to local peer pressure once admitted is implausible on its face and totally unsubstantiated.

In their statement to this Court, appellants rationalize that the rule applies indirectly to admitted attorneys because it requires ad-

[5] New Hampshire Supreme Court Rule 37(1)(a) provides "[a]ny attorney admitted to practice law in this state or any attorney specially admitted to practice by a court of this state is subject to the disciplinary jurisdiction of this court . . . ." Long arm jurisdiction is provided by New Hampshire RSA 510:4 (1983).

mittees to state an intent to remain indefinitely within the state. However, an attorney who decides the day after admission to move to Hawaii can remain a member of the New Hampshire Bar for the remainder of his or her lifetime notwithstanding the residency rule.[6] Conversely, applicants living just over the state line are forever barred unless they change their residence.

Even if there were some slender connection between in-state residence at the time of admission and fitness to practice law, it is apparent that the residence pertinent to achieving appellants' stated goals would be the attorney's office location. Nevertheless appellants have chosen to interpret the residency requirement to mean the applicant's home address. Thus, appellee residing just over the border is prohibited from admission regardless of her intent to associate with a firm in New Hampshire while an applicant residing in New Hampshire but practicing out of state is eligible for admission.

Even the First Circuit opinion which favored reversal of the district court opinion, failed to embrace the rationale advocated by appellants. The opinion noted that the rule "may serve the less than commendable purpose of insulating New Hampshire practitioners from out-of-state competition." (App. 16a.) It justified the rule, however, on the basis that its abolition could "mean large law firms in distant states would exert significant influence upon the decisions, practices and makeup of the New Hampshire bar." (App. 17a.) This argument, however, has never been advanced by appellants in any stage of the proceedings and there is absolutely no evidence on the record to support the speculation that large out-of-state firms have significant interest in New Hampshire practice or the ambition or ability to dominate the New Hampshire Bar. Even, however, were this a possibility, the goal of protecting the

[6] Appellee presented evidence to the district court that a substantial number of New Hampshire Bar members had in fact moved out of state without forfeiting their membership (App. 56a).

local bar from out-of-state firms is virtually indistinguishable from the protectionism that the opinion itself brands as being illegitimate.

Conclusion.

For the foregoing reasons, appellee respectfully requests that the judgment of the district court be affirmed.

Respectfully submitted,

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APPELLANT'S

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No. 83-1466

In The

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SUPREME COURT OF NEW HAMPSHIRE,

Appellant,

vs.

KATHRYN A. PIPER,

Appellee.

On Appeal From the United States Court of Appeals For the First Circuit

APPELLANT'S BRIEF

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QUESTIONS PRESENTED BY THE APPEAL

1. Does the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution limit the authority of the highest court of a State to adopt and enforce a rule imposing a requirement that persons seeking admission to the State bar be residents of the State at the time of their admission?

2. Do the standards of judicial scrutiny under the Privileges and Immunities Clause, as enunciated by the Court in *Toomer v. Witsell*, 334 U.S. 385 (1948) and *Hicklin v. Orbeck*, 437 U.S. 518 (1978), govern federal judicial review of residence requirements for admission to the bar of a State?

3. Do federal courts improperly invade the authority of a State's highest court to define and regulate the practice of law, where they fail to accord proper deference to a determination by the State court that nonresidence at the time of bar admission will interfere with lawyers' availability for court schedulings, continuing legal education, participation in the activities of the unified bar, volunteer service, civic activities, peer pressure upon proper professional conduct and similar matters bearing on the obligations of members of the State's bar?

TABLE OF CONTENTS

	Page
Questions Presented By The Appeal	1
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Constitutional Provisions, Statutes and Rules Involved	2
Statement of the Case	2
Summary of Argument	5
Argument:	
I. Residency Requirements For State Bar Admission Do Not Implicate The Privileges And Immunities Clause Because State Court Control Over Bar Membership Involves An Activity Which Is Directly Connected To And Bound Up With The State's Exercise Of Its Judicial Power, Rather Than An Interest Fundamental To The Promotion Of Interstate Harmony.	7
II. The Simple Residency Requirement Imposed By The New Hampshire Supreme Court Satisfies The Standards Enunciated By This Court Under The Privileges And Immunities Clause, When Those Standards Are Applied With Proper Deference To The Substantial State Interest Involved.	22
A. The Federal District Court And The Two Circuit Judges Failed To Allow "Leeway" By According Proper Deference To The Policy Determination Made By The New Hampshire Supreme Court That A Simple Residency Requirement Would Further Its Substantial Interest In Regulating The Practice Of Law Within The State Of New Hampshire.	22

TABLE OF CONTENTS—Continued

	Pages
B. New Hampshire's Simple Residency Requirement Is Supported By Substantial Reasons, Appropriately Related To The New Hampshire Supreme Court's View Of The Obligations Of New Hampshire Lawyers.	28
Conclusion	37

TABLE OF AUTHORITIES CITED

Cases	Pages
Austin v. New Hampshire, 420 U.S. 656 (1975)	10, 11
Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935)	19
Baldwin v. Montana Fish & Game Commission, 436 U.S. 371 (1978)	10, 11
Bates v. State Bar of Arizona, 433 U.S. 350 (1977)	16, 24
Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873)	18, 38
Brown v. Supreme Court of Virginia, 359 F. Supp. 549 (E.D. Va.) aff'd. mem. 414 U.S. 1034 (1973)	31, 32, 35
Bryant's Case, 24 N.H. 149 (1852)	13
Chen v. Supreme Court of New Jersey, No. 80-1738, *appeal dismissed*, 452 U.S. 933 (1981)	21
Chimento v. Stark, 353 F. Supp. 1211 (D. N.H.) *aff'd. mem.* 414 U.S. 802 (1973)	11, 30
Cole v. Cunningham, 133 U.S. 107 (1890)	11
Conner v. Elliot, 59 U.S. (18 How.) 591 (1856)	10
Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1825)	10, 11, 15
Dandridge v. Williams, 397 U.S. 471 (1970)	32

TABLE OF AUTHORITIES—Continued

	Pages
Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951)	19
District of Columbia Court of Appeals v. Feldman, — U.S. —, 103 S. Ct. 1303, 75 L.Ed. 2d 206 (1983)	24
Doe v. Pringle, 550 F. 2d 596 (10th Cir. 1976)	18
Doran v. Salem Inn, Inc., 422 U.S. 922 (1975)	2
Drociak v. Supreme Court of New Hampshire, No. 80806 (N.H. May 22, 1980), *appeal dismissed and cert. denied*, 449 U.S. 1106 (1981)	21
Dunn v. Blumstein, 405 U.S. 330 (1972)	11
Fleming v. New York Court of Appeals, No. 80-902 (N.Y. September 4, 1980) *appeal dismissed and cert. denied*, 450 U.S. 902 (1981)	21
Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824)	19
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)	16, 24
Gordon v. Committee on Character and Fitness, 48 N.Y. 2d 266, 422 N.Y.S. 641, 397 N.E. 2d 1039 (1979)	9
Green v. Elbert, 63 F. 308 (8th Cir. 1894)	18
In re Griffiths, 413 U.S. 717 (1973)	8, 12, 15, 17
Hicklin v. Orbeck, 437 U.S. 518 (1978)	11, 15, 19, 23, 24, 25, 26
Hoover v. Ronwin, — U.S. —, 52 U.S.L.W. 4535 (5/14/84)	24
In re Judd, 391 Mass. 227, 461 N.E. 2d 760 (1984)	9
Keely v. Evans, 271 F. 520 (D. Or. 1921) *appeal dismissed*, 257 U.S. 667 (1922)	18
King Manufacturing Company v. City Council of Augusta, 227 U.S. 100 (1928)	2

TABLE OF AUTHORITIES—Continued

	Pages
Leis v. Flynt, 439 U.S. 438 (1979)	18, 24
In re Lockwood, 154 U.S. 116 (1894)	18
Martin v. Walton, 368 U.S. 25 (1961)	29, 31, 32
Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982)	12, 20, 24
Mitchell v. Greenough, 100 F.2d 184 (9th Cir. 1938)	18
Niklaus v. Simmons, 196 F. Supp. 691 (D. Neb. 1961)	18
Norfolk & Western Ry. Co. v. Beatty, 423 U.S. 1009 (1975)	11
Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869)	10, 11
Sargus v. West Virginia Board of Law Examiners, 294 S.E. 2d 440 (W. Va. 1982)	9
Schware v. Board of Bar Examiners, 353 U.S. 232 (1957)	29
Shapiro v. Thompson, 394 U.S. 618 (1969)	11
Sharp v. Lucky, 148 F. Supp. 8 (D. La. 1957)	18
Sheley v. Alaska Bar Ass'n., 620 P. 2d 640 (Ala. 1980)	9
Silverstein's Case, 108 N.H. 400 (1967)	14
The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873)	11
Stalland v. South Dakota Board of Bar Examiners, 530 F. Supp. 155 (D.S.D., 1982)	9, 20, 29
Stevens v. Fuller, 55 N.H. 443 (1875)	13
Strauss v. Alabama State Bar, 320 F. Supp. 173 (N.D. Ala. 1981)	9
Toomer v. Witsell, 334 U.S. 385 (1948)	23, 25, 26

TABLE OF AUTHORITIES—Continued

	Pages
United Building and Construction Trades Council v. City of Camden, — U.S. —, 104 S.Ct. 1020, 79 L.Ed.2d 1020 (1984)	7, 11, 23
United States v. Howard, 352 U.S. 212 (1957)	2
Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1871)	10
Wilson v. Wilson, 416 F. Supp. 984 (D. Or. 1976) *aff'd. mem.* 430 U.S. 925 (1977)	21
Younger v. Harris, 401 U.S. 37 (1971)	20
Zobel v. Williams, 457 U.S. 55 (1982)	17, 23
Constitutional Provisions	
Article IV, Section 2, United States Constitution	2, 3
Statutes and Rules	
28 U.S.C. §1254(2)	2
28 U.S.C. §1257	2
New Hampshire Supreme Court Rule 37	14, 20
New Hampshire Supreme Court Rule 42	2, 3, 14, 29, 33, 36
Supreme Court Judicature, Rules 23, 24 (1829)	14
Rules for the Regulation of Practice in the Courts of Common Law and Chancery of the State of New Hampshire No. 40	13, 14
New Hampshire Superior Court Rule 1	13
New Hampshire Revised Statutes Annotated 311:6	13, 14
New Hampshire Revised Statutes Annotated 604-A	21
Act of July 26, 1986, ch. 31, 1 N.H. Laws 123-124 (1679-1702)	13
Act of May 14, 1718, ch. 29, 2 N.H. Laws 298 (1702-1745)	13

TABLE OF AUTHORITIES—Continued

	Pages
Act of November 8, 1777, ch. 1, 4 N.H. Laws 107 (1776-1784)	13
12 Vermont Statutes Annotated, App. I, Pt. II, §6 (i) (1) (1982 Supp.)	19
Miscellaneous	
Eastman, "Qualification for Admission to the New Hampshire Bar," 3 *Proc. N.H. Bar Ass'n* 333 (1909-1916)	14
M. Farrand, *Records of the Federal Convention* (3rd Ed. 1966)	10
Mayer, *The Lawyers* (1967)	31
New Hampshire Law Weekly, Vol. 8, No. 225 (1981)	20
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L. Tribe, *American Constitutional Law*, §6-33 (Supp. 1979)	20
R. Upton, "Centennial History of the New Hampshire Bar Association," 15 *N.H. Bar Journal* 35 (1973)	14

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APPELLANT'S BRIEF

OPINIONS BELOW

The Opinion of the United States District Court for the District of New Hampshire was reported at 539 F. Supp. 1054; see, Jurisdictional Statement Appendix, p. 51a. The original Opinion of the United States Court of Appeals for the First Circuit, reversing the judgment of the District Court, is reported at 722 F.2d 98; see, Jurisdictional Statement Appendix, p. 24a. The Opinions of the Court of Appeals en banc are reported at 722 F.2d 110; see, Jurisdictional Statement Appendix, p. 1a.

JURISDICTION

The jurisdiction of this Court on appeal is invoked under 28 U.S.C. §1254 (2). New Hampshire Supreme Court Rule 42 is a "state statute" within the meaning of 28 U.S.C. §§1254 (2) and 1257. *See e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *United States v. Howard*, 352 U.S. 212 (1957); and *King Manufacturing Company v. City Council of Augusta*, 277 U.S. 100 (1928).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Privileges and Immunities Clause, Article IV, §2 of the United States Constitution, provides in pertinent part:

> "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

New Hampshire Supreme Court Rule 42(3) and New Hampshire Supreme Court Rule 42(8) are set forth in the *Jurisdictional Statement* at page 3.

STATEMENT OF THE CASE

The Appellee, Kathryn A. Piper, is a resident of the State of Vermont and a member of the Vermont Bar. Joint

Appendix ("J.A."), p. 4. In 1979, she applied for permission to take the February, 1980 New Hampshire bar examination, and signed, under oath, a statement of intent to establish residency in New Hampshire. J.A., pp. 5, 45. Ms. Piper took and passed the New Hampshire bar examination. J.A., p. 6.

In April, 1980, Ms. Piper was notified that she had passed the bar examination, and would be eligible for admission to the New Hampshire bar upon establishing residence in the State. J.A., p. 11. Ms. Piper subsequently requested, by letter, to be exempted from the residency requirement. J.A., p. 12. Her request was denied by the New Hampshire Supreme Court on May 13, 1980. J.A., p. 14. She then filed a "formal petition" with the New Hampshire Supreme Court seeking exemption from the residency requirement. J.A., p. 15. Her "petition" was denied by the New Hampshire Supreme Court on December 31, 1980. J.A., p. 16.

On March 22, 1982, Kathryn Piper filed a complaint in the United States District Court for the District of New Hampshire, asserting that the New Hampshire bar residency requirement violated her constitutional rights, including the privileges and immunities guaranteed by Article IV, Section 2 of the United States Constitution. J.A., p. 2. The issues presented to this Court were initially raised in the District Court by Ms. Piper's Motion for Summary Judgment, and the New Hampshire Supreme Court's Motions to Dismiss. J.A., pp. 17, 19, 23. On May 17, 1982, the District Court granted Ms. Piper's Motion for Summary Judgment, holding that New Hampshire

Supreme Court Rule 42 violated the Privileges and Immunities Clause of the federal Constitution, and enjoined the New Hampshire Supreme Court from enforcing the residency requirement. *Jurisdictional Statement Appendix*, p. 51a.

The issues now raised on this appeal were raised by the appellant, Supreme Court of New Hampshire, in its appeal to the United States Court of Appeals for the First Circuit. The Court of Appeals stayed the judgment of the District Court pending appeal. On May 25, 1983, the Court of Appeals initially reversed the judgment of the District Court and held, in a 2-1 decision, that New Hampshire's residency requirement was constitutional. *Jurisdictional Statement Appendix*, p. 24a. On August 2, 1983, the First Circuit Court of Appeals granted Piper's Petition for Rehearing *en banc*. *Jurisdictional Statement Appendix*, p. 49a. On December 5, 1983, the Court of Appeals for the First Circuit affirmed the judgment of the District Court by an equally divided 2-2 panel. *Jurisdictional Statement Appendix*, p. 1a. On December 27, 1983, the Court of Appeals continued its stay of the District Court's judgment, pending appeal to this Court.

A timely Notice of Appeal and Amended Notice of Appeal were filed in the Court of Appeals. *Jurisdictional Statement Appendix*, pp. 71, 72a.

SUMMARY OF ARGUMENT

This case presents the issue whether the highest court of a State may, consistent with the Privileges and Immunities Clause, use a simple residency requirement as part of its effort to define the characteristics and obligations of the State's bar.

It is the position of the New Hampshire Supreme Court that its exercise of control over the New Hampshire bar is not limited by the Privileges and Immunities Clause, because State control over the bar bears a close relationship to a State's ability to function as a sovereign political body. In regulating the bar, a State court is regulating an activity directly connected and bound up with the State's ability to exercise its judicial power, rather than an interest fundamental to the promotion of interstate harmony.

Imposing the Privileges and Immunities Clause as a direct restraint upon a State court's regulation of its bar is unsupported by the Clause's constitutional history or this Court's subsequent application of the Clause, and directly conflicts with this Court's repeated decisions recognizing that the licensing and regulation of lawyers is a matter for the States. It would open an entire new line of litigation in the federal courts and could result in requests for federal court intervention, not only with respect to explicit residency requirements, but also as to any State requirement for bar membership which might arguably affect nonresidents differently from residents.

Furthermore, even if the Privileges and Immunities Clause were deemed to apply to State court control over

the bar, substantial reasons support New Hampshire's simple residency requirement. This Court's decisions require that in Privileges and Immunities cases, federal courts must afford "considerable leeway" to state determinations. When State control over the bar is involved, such leeway requires great deference on the part of federal courts.

Appropriate deference is accorded not by the substitution of a federal court's judgment, but by determining whether there is a reasonable basis upon which a properly motivated State court could reach its conclusion that a residency requirement assists in assuring performance of obligations the State court has imposed in the course of defining the nature and characteristics of the proper practice of law in the State. In this case, the New Hampshire Supreme Court could reasonably conclude that residency at the time of bar admission assists not only in promoting lawyer competence and proper professional conduct, but also is necessary to promote continuing legal education, pro bono and other voluntary activity, indigent defense and civic activities which the New Hampshire Supreme Court has determined to be among the obligations of New Hampshire lawyers. The lower federal courts failed to accord appropriate deference to the New Hampshire Supreme Court's conclusions in this regard and under the proper standard of review, should have upheld them.

ARGUMENT

I. Residency Requirements For State Bar Admission Do Not Implicate The Privileges And Immunities Clause Because State Court Control Over Bar Membership Involves An Activity Which Is Directly Connected And Bound Up With The State's Exercise Of Its Judicial Power, Rather Than An Interest Fundamental To The Promotion Of Interstate Harmony.

This Court has recently reaffirmed that application of the Privileges and Immunities Clause to a particular instance of discrimination against out-of-state residents entails a two-step inquiry. As an initial matter, the Court must determine whether the State enactment burdens one of the privileges and immunities protected by the Clause. The "threshold matter" to be determined is whether the out-of-state resident's interest is sufficiently fundamental to the promotion of interstate harmony so as to fall within the purview of the Privileges and Immunities Clause. *United Building and Construction Trades Council v. City of Camden*, — U.S. —, 104 S.Ct. 1020, 79 L.Ed.2d 249, 256-259 (1984). Accordingly, in this case the initial inquiry must be whether State control of the legal profession involves regulation of a "protected privilege" under the Clause.

The Supreme Court of New Hampshire submits that State court control over the practice of law is not regulation of a protected privilege which is fundamental to the promotion of interstate harmony. Rather, as the original majority of the Court of Appeals supported, control over State bar membership bears a very close relationship to a State's ability to function as a sovereign political body.

Piper, 723 F.2d 98, 102-103. As this Court has recognized, a State's control over bar membership regulates an activity which is directly connected and bound up with an individual State's ability to exercise judicial power and administer justice.

This vital threshold issue was not properly dealt with in the opinions below which ruled adversely to the New Hampshire Supreme Court's position. The Opinion of Circuit Judges Bownes and Coffin (of the equally divided Court of Appeals, en banc) simply quoted language from *In re Griffiths*, 413 U.S. 717 (1973) to the effect that United States nationality requirements could not be applied to the practice of law, because lawyers are not government officials or formulators of government policy. Piper, 723 F.2d 110, 114-115. From that language, the two Judges concluded that control over the practice of law "does not implicate state sovereignty." *Ibid.*

Similarly, the District Court assumed without careful analysis that State control of the legal profession is regulation of a protected privilege. The District Court noted that state regulation of natural resources has traditionally been exempted from scrutiny under the Privileges and Immunities Clause, but merely concluded that the "traditional deference" of the federal courts to state's regulation of the legal profession "does not constitute an exception to the Privileges and Immunities Clause." *Piper*, 559 F. Supp. 1068, 1071. Neither the District Court nor the Bownes-Coffin Opinion undertook any fundamental inquiry into whether state control of the legal profession should be subject to scrutiny under the Clause, nor did they examine the historical and functional aims of the Clause, nor did they confront the potential consequences of their holdings.

Other courts which have recently struck down bar admission residency requirements have also failed to pursue the necessary threshold inquiry and have simply assumed that state control of the legal profession falls under the Clause. See, *Sargus v. West Virginia Board of Law Examiners*, 294 S.E.2d 440 (W. Va., 1982); *Stalland v. South Dakota Board of Bar Examiners*, 530 F. Supp. 155 (D.S.D. 1982); *Strauss v. Alabama State Bar*, 520 F. Supp. 173 (N.D. Ala. 1981); *Skeley v. Alaska Bar Ass'n*, 620 P.2d 640 (Alaska 1980); *Gordon v. Committee on Character & Fitness*, 48 N.Y.2d 266, 422 N.Y.S. 641, 397 N.E.2d 1309 (1979); *In re Judd*, 391 Mass. 227, 461 N.E.2d 760 (1984).

Thus, this case presents this Court with an opportunity to pursue the required threshold analysis which other courts have overlooked. Such analysis should avoid the process of analogy by label on which lower court decisions have turned. While acknowledging that the Clause prohibits state regulation denying non-residents equal opportunity in economic pursuits, proper analysis must recognize that state control of the legal profession is not rooted in economic regulation. Rather, control over lawyers' ability to invoke the powers of the state and their intimate participation in the exercise of judicial power differs from regulation of private professionals. Subjecting state control over lawyers to scrutiny under the Privileges and Immunities Clause would not promote the aims of the Clause; rather it would call into question the states' ability to control those who daily exercise state power, any time such control might be said to affect residents and nonresidents differently.

The Clause provides, "The citizens of each state shall be entitled to all privileges and immunities of citizens in

the several states." The surviving constitutional history indicates that the Framers contemplated protection of only the most fundamental rights, particularly economic pursuits, when considering the Privileges and Immunities Clause. In the Articles of Confederation the Clause was grouped with the commerce clause, "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of this Union." *Arts. Confederation*, art. IV. Charles Pinckney, the drafter of the final version of the Clause, explained that it was "formed exactly upon the principles" of its precursor in the Articles of Confederation. 3 M. Farrand, *Records of the Federal Convention* 112 (rev. ed. 1966); *see Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371, 379-80 (1978); *Austin v. New Hampshire*, 420 U.S. 656, 660-61 & n.6 (1975). To illustrate, the records of the Federal Convention indicate that the Framers believed the Clause should prohibit states from restricting nonresidents' right to possess and transport property. *See* 2 M. Farrand, *supra*, at 443, 637.

Courts that subsequently interpreted the Clause have refused to enumerate the specific privileges and immunities it protects. *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1825) (No. 3,230); *Conner v. Elliott*, 59 U.S. (18 How.) 591, 593 (1856); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871). Instead, they have used general terms in describing the scope of the Clause. Thus, the Clause protects only "fundamental" privileges. *Corfield v. Coryell*, *supra*, at 552. It removes from nonresidents the general "disabilities of alienage," *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869), and confers on them "a general

citizenship" in other states. *Cole v. Cunningham*, 133 U.S. 107, 113-14 (1890); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 76 (1873); 3 J. Story, *Commentaries on the Constitution of the United States* § 1800 (1st ed. Boston 1833). In practice, however, the Court has invoked the Privileges and Immunities Clause only where state regulation makes "nonresidence an improper basis for locating a special burden." *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975). The Clause shares a "mutually reinforcing relationship" with the commerce clause, because both prohibit economic protectionism, and consequently the Court considers commerce clause decisions appropriate citations in privileges and immunities disputes. *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978).

The Clause does not guarantee to nonresidents participation "in all the rights which belong exclusively to the citizens of any other particular state." *Corfield v. Coryell*, *supra*, at 552. States may distinguish residents from nonresidents if the distinction merely ensures that "this is a Nation composed of individual States" and does not impair "the vitality of the Nation as a single entity." *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371, 383 (1978). The Clause does not guarantee nonresidents sufferage in state elections, *Dunn v. Blumstein*, 405 U.S. 330 (1972); eligibility for an elective State office, *Chimento v. Stark*, 353 F. Supp. 1211 (D.N.H.), *aff'd mem.* 414 U.S. 802 (1973); or the right to receive certain services, *Shapiro v. Thompson*, 394 U.S. 618 (1969). Giving interstate effect to such privileges would be "utterly destructive of the independence and harmony of the States." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 181 (1869). As noted, in *United Building and*

Construction Trades Council, *supra*, this Court once again limited the purview of the clause to interests fundamental to the promotion of interstate harmony. 79 L.Ed.2d 249, 258-259.

State control over the practice of law should be recognized as another area which the Privileges and Immunities Clause does not address, because it involves control over those who exercise state power on a daily basis. By their admission to a bar, lawyers obtain a license to appear and try cases. With this license, lawyers "can cause witnesses to drop their private affairs and be called for depositions and other pretrial processes" and can wield "the enormous power of cross-examination of witnesses." In short, lawyers enjoy a "broad monopoly . . . to do things other citizens may not lawfully do." *In re Griffiths*, 413 U.S. 717, 731 (1973) (Burger, C.J., dissenting). A State's control over its legal profession is not economic protectionism, but rather amounts to control over the use of State authority. Such control promotes the State's "extremely important interest in maintaining and assuring the professional conduct" of a select group of citizens whose activities are directly connected and bound up with the exercise of judicial power and the administration of justice. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 and n.11 (1982). Thus, control of attorneys serves State *governmental* purposes, rather than simply *economic* concerns.

Close State control over the practice of law antedates the Privileges and Immunities Clause. Like other States, New Hampshire courts have long recognized the unique powers of attorneys and have regulated them accordingly.

When attorneys litigate, they place at risk "the life, liberty, reputation and property of . . . their fellow citizens." *Bryant's Case*, 24 N.H. 149, 153 (1852). For this reason, New Hampshire has considered abuse of legal process "an unmitigated evil" capable of becoming "of serious and alarming magnitude," *Stevens v. Fuller*, 55 N.H. 443, 444 (1875), and has from colonial times adopted measures to prevent its occurrence. Since 1686, New Hampshire lawyers have been required to affirm that they "shall delay no man for lucre or malice" and that they "shall not wittingly or willingly sue, nor procure to be Sued any false Suite . . . on paine of being expulsed from the Court for ever." Act of July 26, 1686, ch. 31, 1 N.H. Laws 123-24 (1679-1702); see, N.H. Rev. Stat. Ann. 311:6 (1955). As early as 1718 attorneys were held "liable to answer and pay to the Adverse Party his Cost arising" from an abuse of process. Act of May 14, 1718, ch. 29, 2 N.H. Laws 298 (1702-1745).

Since 1777, lawyers have sworn to uphold the Constitution of the State of New Hampshire. Act of Nov. 8, 1777, ch. 1, 4 N.H. Laws 107 (1776-1784); N.H. Rev. Stat. Ann. 311:6 (1955). Since 1875, only lawyers have been entrusted with signed blank writs for commencing lawsuits. *Stevens v. Fuller*, 55 N.H. 443 (1875); see, Rules for the Regulation of Practice in the Courts of Common Law and Chancery of the State of New Hampshire, No. 40 (1875); N.H. Super. Ct. Rule 1 (1979). For the first century of the State's existence New Hampshire's highest court required that student attorneys clerk for at least three years in the office of a New Hampshire attorney before it permitted them to appear. See, e.g., *Record of First Statewide Meeting of the Bar* (1788), *reprinted* in

Upton, "Centennial History of the New Hampshire Bar Association," 15 *N.H. Bar Jour.* 35, 103 (1973); Sup. Ct. Judicature Rules 23, 24 (1926); Rules for the Regulation of Practice in the Courts of Common Law and Chancery of the State of New Hampshire, Nos. 27, 28 (1859). The requirement sought to ensure that the student learn the proper "use of process" and "regard his calling as intended to promote justice, and right wrong, rather than exercise art and chicanery." Eastman, "Qualification for Admission to the New Hampshire Bar," 3 *Proc. N.H. Bar Ass'n* 333, 340 (1909-1916) (President's Address).

Today, New Hampshire continues its tradition of close regulation of the legal profession. The New Hampshire Supreme Court directly supervises the regulation of the professional conduct of the state's attorneys. N.H. Sup. Ct. Rule 37. All admittees to the bar must attend a practical skills course as well as pass the bar examination. N.H. Sup. Ct. Rule 42(7). All attorneys must follow the stringent requirements of the state's new trust account rule. N.H. Sup. Ct. Rule 37(7).

These rules demonstrate that in New Hampshire, lawyers' obligations as officers of the court are not simply figurative or historic: they require attorneys to bring suit and use process "with all due fidelity to the court as well as the client." N.H. Rev. Stat. Ann. 311:6 (1955); *Cf. Silverstein's Case*, 108 N.H. 400, 401, 236 A.2d 498, 499 (1967). They are consistent with recognition that the license to practice law is a license to invoke the power of the State on a daily basis.

Recent federal and State court decisions placing control of the practice of law within the scope of the Privileges and Immunities Clause have not confronted the distinction between control over the legal profession and state regulation of economic pursuits and other vocations. These *supra*, stating that the Privileges and Immunities Clause protects the "right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits or otherwise." 6 F. Cas. 546, 552. Also the cases have cited *Hicklin v. Orbeck*, 437 U.S. 518 (1978). In *Hicklin*, this Court voided a statute establishing a residency requirement for construction workers on the Alaskan oil and gas pipeline. The Court explained that the statute fell within the scope of the Privileges and Immunities Clause, because it was a form of "state discrimination against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State." *Id.* at 524. Additionally, in the present case two judges of the Court of Appeals invoked the "political function" test of *In re Griffiths*, 413 U.S. 717 (1973) to determine the applicability of the Privileges and Immunities Clause.

Thus, the courts which have subjected control over the legal profession to scrutiny under the Clause have relied upon analogy by label rather than careful analysis. Because they have classified the practice of law as a "profession" without political function, they have assumed that control over the practice of law is indistinguishable from regulation of other "professional pursuits" and "common callings" which, under *Corfield* and *Hicklin*, are protected by the Privileges and Immunities Clause. But State control over the legal profession is distinguishable from reg-

ulation of other vocations, not because the legal profession is "learned," nor because lawyers are governmental officials or formulators of policy, but because when States control lawyers, they regulate users, as well as potential abusers, of State power.

Courts which have subjected control over the legal profession to analysis under the Privileges and Immunities Clause have unanimously relied upon this Court's decisions allowing advertising by attorneys, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and publication of legal fee schedules, *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). In those cases the Court simply held that legal advertising is indistinguishable from other commercial advertising and rejected distinctions between the legal profession and other vocations when they were incompatible with the goals of the First Amendment and the Sherman Act, 15 U.S.C. §§ 1 *et seq.* (1976). Those decisions do not require federal courts to treat control over the practice of law like regulation of other economic pursuits in all respects. The Privileges and Immunities Clause prohibits economic protectionism by the States, but it is not directed at State control of integral State processes. Indeed, both *Bates* and *Goldfarb* recognized that the "interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'". *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975), quoted with approval in *Bates v. State Bar of Arizona*, 433 U.S. 350, 361-62 (1977).

Furthermore, as previously noted, the Opinion of Circuit Judges Bownes and Coffin (of the equally divided Court of Appeals *en banc*) placed inappropriate reliance on *In re Griffiths*, 413 U.S. 717 (1973) to support their conclusion that for the purposes of applying the Clause, State control over the practice of law is "outside the range of occupations implicating State sovereignty" and that for the purposes of Privileges and Immunities analysis, State control over bar admission was to be treated "on the same terms as similar requirements for any other commercial or professional livelihood." *Piper*, 723 F.2d 110, 115.

Contrary to the Judges' position, *Griffiths* teaches only that because lawyers are not officials of government nor formulators of governmental policy, United States nationality cannot be required for Bar admission under appropriate Equal Protection analysis involving the suspect classification of alienage. *Griffiths* holds only that a State may not discriminate against alien residents who seek admission to the State bar. *Griffiths* simply did not address the issue whether State control over those whose activities are directly connected and bound up with the State's exercise of its judicial power, necessarily implicates an interest fundamental to the promotion of interstate harmony. Indeed, *Griffiths* could not have done so because the prohibition against discrimination on the basis of nationality cannot be derived from the Privileges and Immunities Clause. *Zobel v. Williams*, 457 U.S. 55, 73 at n.3 (1982) (O'Connor, J., concurring). Whether state control over the practice of law implicates the Privileges and Immunities Clause is not determined merely because lawyers perform no "political function".

As the foregoing demonstrates, subjecting State control over the legal profession to the rigors of the Privileges and Immunities Clause is unjustified by the constitutional history or this Court's subsequent interpretation of the Clause. Moreover, such a holding would raise questions about the Court's long settled doctrine that State courts, not lower federal courts, control the practice of law in the first instance. In upholding Ohio's *pro hac vice* rule, the Court observed:

> Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers.

Leis v. Flynt, 439 U.S. 438, 442 (1979).

The doctrine dates from *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872), and *In re Lockwood*, 154 U.S. 116 (1894), which hold that the right to practice law in the state courts is not a privilege granted by the federal constitution or laws. Lower federal courts have consistently invoked the doctrine in dismissing suits for individual relief from state disciplinary actions. *See, e.g., Green v. Elbert*, 62 F. 308 (9th Cir. 1894); *Keeley v. Evans*, 271 F. 539 (D. Or. 1921), *appeal dismissed*, 257 U.S. 667 (1922); *Mitchell v. Greenough*, 100 F.2d 194 (9th Cir. 1938); *Sharp v. Lucky*, 148 F. Supp. 8 (D. La. 1957); *Nibbens v. Simmons*, 196 F. Supp. 691 (D. Neb. 1961); *Doe v. Pringle*, 550 F.2d 596 (10th Cir. 1976).

If control over the practice of law were to be thrust within the ambit of the Privileges and Immunities Clause, litigants would promptly call upon the federal courts to

oversee many aspects of the States' control of the legal profession. The responses of the courts would likely parallel the development of decisions under the Commerce Clause, which shares a "common origin" and "vision of federalism" with the Privileges and Immunities Clause. *Hicklin v. Orbeck*, 437 U.S. 518, 532-33 (1978). At first, residency requirements, *pro hac vice* rules, and other forms of explicitly different treatment of nonresidents would be challenged. *Cf. Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Then would come challenges to disciplinary actions and other disputes where disgruntled attorneys might allege an unstated bias against nonresidents. *Cf. Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). Ultimately, regulations which merely affect nonresidents differently from residents would be subject to attack. *Cf. Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

For example, Ms. Piper's own state, Vermont, imposes a requirement that bar applicants complete a six-month "clerkship" with a Vermont lawyer before becoming eligible for admission, 12 Vt. Stat. Ann. App. I, Pt. II, § 6(i)(1) (1982 Supp.). Arguably, that requirement imposes an obligation which falls more heavily on non-residents of Vermont, because it effectively requires their presence in Vermont for a six-month period prior to admission.

Many aspects of New Hampshire's control over the legal profession would thus become subject to federal judicial review because they might arguably be more difficult for nonresidents to comply with. To illustrate, the New Hampshire court expects its attorneys to provide legal services to the state's criminal defendants and *pro bono* clients. It expects its attorneys to prepare and pur-

tinguate in continuing legal education programs and serve on committees of the integrated state bar. It requires that attorneys' financial records be kept and clients' funds be held in specified ways. N.H. Sup. Ct. Rule 37(7)(1980). It administers a bar examination that requires knowledge of the New Hampshire Constitution. See, 9 *N.H. Law Weekly* 225 (1981). Because of the exigent standard of review applied under the Privileges and Immunities Clause, challenges to these requirements might succeed. One commentator has suggested that the existence of even a single less restrictive alternative to a disputed regulation is sufficient to void the regulation under that standard of review. L. Tribe, *American Constitutional Law* 6-33, at 410 (Supp. 1979); *see Stolland v. South Dakota Board of Bar Examiners*, 520 F. Supp. 155, 159 (D.S.D. 1982) (following Tribe).

If such challenges were successful, the burden of fulfilling the bar's obligation to provide counsel in criminal cases and *pro bono* services, of preparing continuing legal education programs, and of serving on committees of the State bar would fall disproportionately upon resident members of the bar. In addition, nonresident members living in distant states with less stringent disciplinary rules could easily evade New Hampshire's innovative disciplinary measures, such as the state financial records rule. See, N.H. Supreme Court Rule 37(7). The result would violate this Court's admonition that "the National Government will fare best if the States and their institutions are free to perform their separate functions in their separate ways." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982), quoting *Younger v. Harris*, 401 U.S. 37 (1971).

Litigation over these forms of State control of the legal profession, which has traditionally occurred in the State courts, would be transferred to an already overburdened federal court system. This Court's consistent past refusal to review lower court decisions which declined to strike down residency requirements indicates that the Court has not disapproved lower court reluctance to take up this additional burden. *Dvorak v. Supreme Court of New Hampshire*, No. 80906 (N.H. May 22, 1980), *appeal dismissed and cert. denied*, 449 U.S. 1106 (1981); *Fleming v. New York Court of Appeals*, No. 80-302 (N.Y. Sept. 4, 1980), *appeal dismissed and cert. denied*, 450 U.S. 902 (1981); *Chen v. Supreme Court of New Jersey*, No. 80-1720 (N.J. Feb. 5, 1981), *appeal dismissed*, 452 U.S. 922 (1981); *Wilson v. Wilson*, 416 F. Supp. 984 (D. Or. 1976), *aff'd mem.*, 430 U.S. 925 (1977).

The Framers did not adopt the Privileges and Immunities Clause to favor the beginnings of a national bar. The Clause prohibits States from discriminating against nonresidents' economic pursuits; it does not prevent States from controlling those who exercise state power. A holding that the Privileges and Immunities Clause renders State control of the practice of law would invite challenges to any State regulation of the legal profession which could be said to disadvantage nonresident attorneys. Such a holding would cripple a State's ability to police those who invoke its authority, without promoting the interests protected by the Clause.

II. The Single Residency Requirement Imposed By The New Hampshire Supreme Court Satisfies The Standards Enunciated By This Court Under The Privileges And Immunities Clause When Those Standards Are Applied With Proper Deference To The Substantial State Interest Involved.

The New Hampshire Supreme Court has contended that the interests of interstate harmony do not require this Court to impose the Privileges and Immunities Clause as a direct restraint on State court regulation of the practice of law. However, even if this Court were to do so, the decisions of this Court would require that inquiry under the Clause in the context of State bar regulation must be conducted with greater deference to State interests than was accorded by the District Court and Circuit Judge Bowman and Coffin. If proper deference is shown, New Hampshire's residency requirement would satisfy this Court's enunciated standards under the Privilege and Immunities Clause.

A. The Federal District Court And The Two Circuit Judges Failed To Allow "Leeway" By According Proper Deference To The Policy Determination Made By The Supreme Court of New Hampshire That A Single Residency Requirement Would Further Its Substantial Interest In Regulating The Practice Of Law Within The State Of New Hampshire.

Analysis of a challenged residency requirement under the Privileges and Immunities Clause requires a two-pronged inquiry:

> First, there must be "something" to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed, *Hicklin v. Orbeck*, 437 U.S. 518, 525-6 (1978) quoting *Toomer v. Witsell*, 334 U.S. 385, 398 (1948). Second, the Court must find a "substantial relationship" between the evil and the discrimination practiced against non-citizens. *Id.* at 527.

Zobel v. Williams, 457 U.S. 55 (1982). A State establishes a "substantial reason" for discrimination against non-residents when it advances "*[s]omething to indicate* that non-citizens constitute a peculiar source of evil at which the statute is aimed". *Toomer v. Witsell*, 334 U.S. 385, 398 (emphasis added); *see also, Hicklin v. Orbeck*, 437 U.S. 518, 525, 526.

However, as this Court has recently emphasized, the Privileges and Immunities Clause is "not an absolute", and *every* inquiry under the Clause "must be conducted with due regard for the principle that the state should have considerable leeway in analyzing local evils and prescribing appropriate cures." *United Building and Construction Trades Council v. City of Camden*, 79 L.Ed.2d at 261, citing *Toomer v. Witsell*, 334 U.S. 385, 396 (1948). As the original Opinion of the Court of Appeals correctly recognized, in order to give *meaningful* "leeway" to the challenged state policy, its relationship to the "State's ability to function as a unique sovereign entity" must be taken into consideration:

> Where the policy in question is simply directed at various forms of private enterprise, the goal of national unification outweighs any threat to the state's independent existence. It is in such cases that the state is required to show a very strong and precise justification for any discrimination based on citizenship. [Citations omitted]. Where however, the state policy is also closely tied to the state's ability to function as a sovereign government, we think the balance shifts with the goal of national unity being

then outweighed by the policy favoring maintenance of a *federal* system.

Piper, 723 F.2d 98, 102. (Emphasis in original).

A virtually unbroken line of decisions by this Court acknowledges the close relationship between control over the state bar and the state's ability to function as a sovereign government *District of Columbia Court of Appeals v. Feldman*, — U.S. —, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); *Middlesex County Ethics Committee v. Garden Bar Ass'n*, 457 U.S. 423, 434 and n.11 (1982); *Leis v. Flynt*, 439 U.S. 438, 442 (1979); *Bates v. State Bar of Arizona*, 433 U.S. 350, 361 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). In *Leis v. Flynt*, 439 U.S. 438, 442 (1979), a case decided after *Hicklin v. Orbeck*, this Court reaffirmed that the States are *exclusively* responsible for the licensing and regulation of attorneys within their respective jurisdictions. Indeed, this Court recently noted that its "[a]ttention has not been drawn to any trade or other profession in which the licensing of its members is determined directly by the sovereign itself—here the State Supreme Court." *Hoover v. Rowwin*, 52 U.S.L.W. 4535, 4541, n.34 (5/14/84). It is this unique relationship between a profession regulated by the State and the judicial branch of State government which mandates, as the opinions of Circuit Judge Campbell correctly reasoned, increased deference to a State's policy determination that a residency requirement for admission to the bar directly affects its ability to operate as a sovereign entity. *Piper*, 723 F.2d 98, 103, and 723 F.2d 110, 120-121.

The increased deference to the State's traditional control over its bar, shown by the Court of Appeals in its original Opinion, is precisely the "considerable leeway"

which, according to this Court in *Toomer*, is permissible in proper cases. Less exacting scrutiny under the Privileges and Immunities Clause must be applied by courts reviewing bar admission regulations in order to give effect to this Court's firm and repeated admonition that a State is to be shown great deference in areas where control over its bar is involved. The nature and importance of the State interest implicated in this case distinguishes it from a parochial State attempt to limit access to purely economic pursuits to its own residents. In the latter case, literal application of the *Hicklin* standards may be appropriate, but in the case of State bar regulations, this Court's own decisions require that "due regard" be given for the State's "considerable leeway" in analyzing the "evil" posed by non-resident attorneys and in prescribing an appropriate "cure".

The critical flaw in the reasoning of the District Court's opinion and in the Bownes-Coffin opinion is the failure of these opinions to properly adjust the analysis under *Hicklin v. Orbeck* to accommodate this Court's decisions identifying state control over the bar as a substantial interest, entitled to great deference by the federal judiciary. The lower courts merely recite this Court's admonition in *Toomer* of according "considerable leeway" to State policy determinations, and then proceed to give the State's policy no leeway whatsoever. By rigidly applying the exacting standards of *Hicklin v. Orbeck* to a State court's policy decision concerning admission to its bar, the lower federal courts failed to accord the proper deference required by this Court's decisions. Indeed, by utilizing what amounted to a "least restrictive alterna-

tive" analysis, the District Court and the Bowers-Coffin opinion hold New Hampshire's residency rule to an even higher standard than is imposed by the "substantial reason" and "reasonable relationship" tests of *Hicklin* and *Toomer*.

Proper deference to the fundamental State interest involved in the regulation of its bar does not permit the federal judiciary to substitute its judgment as to what measures would appropriately accomplish the state's objective in imposing a bar admission requirement. Rather, due deference requires the federal court to sustain the requirement if there is a reasonable basis upon which a properly motivated State court could have reached its conclusion that the admission requirement was necessary.

The District Court and Judges Bowers and Coffin quickly discounted three of the reasons advanced by the New Hampshire Supreme Court for imposition of its residency requirement, and completely ignored the fourth justification for the rule, which was the justification most specific to New Hampshire's circumstances. This justification was set forth in the affidavit of John King, Chief Justice of the New Hampshire Supreme Court:

> The residency requirement promotes the continued vitality of a competent, stable and well informed State Bar. The New Hampshire Bar is an integrated Bar which depends heavily on the active participation of all its members in its efforts to improve the quality and extent of legal services offered within the State of New Hampshire. In the absence of a residency requirement, the burden of providing those voluntary services currently provided by members of the New Hampshire Bar in such areas as participation on bar association committees; presentation of continuing legal education programs; participation in significant *pro bono* cases on a voluntary basis; and participation in community programs designed to afford information to the public about the services offered by the New Hampshire Bar would fall disproportionately on those members of the Bar who happen to reside within the State. Similarly, the burden of handling court-appointed cases, such as those required under the indigent defense program, would, as a practical matter, fall on resident members of the New Hampshire Bar.

J.A., p. 34.

The failure of the District Court and Judge Bowers and Coffin even to address this justification exemplifies their lack of deference to the State judiciary. Having decided peremptorily that they disagreed with New Hampshire's policy, these federal judges did not even take the opportunity to consider whether the Supreme Court of New Hampshire may have chosen a residency requirement as one means of shaping the characteristics of its State bar, a bar which the New Hampshire Supreme Court seeks to actively involve in expanding and improving the administration of justice in New Hampshire.

As discussed *infra*, the bar admission rule imposed by the New Hampshire Supreme Court is justified by substantial reasons, which are appropriately addressed to the New Hampshire Supreme Court's concerns about the powers, duties and responsibilities of New Hampshire attorneys. If these legitimate concerns and the New Hampshire Supreme Court's response to them had been accorded the necessary "leeway" through proper deference by the District Court or Justices Bowers and Coffin the residency requirements should have been upheld.

B. New Hampshire's Simple Residency Requirement Is Supported By Substantial Reasons, Appropriately Related To The New Hampshire Supreme Court's View Of The Obligations Of New Hampshire Lawyers.

As previously discussed, if this Court's policy of deference to State court regulation of the practice of law is to have real meaning, it should not require the federal judiciary to agree with the wisdom of the result reached by the State. Yet when a federal judge requires a State court to demonstrate to his satisfaction that a particular policy is "closely tailored" to the problem it addresses, in fact the federal judge is according no deference at all to the state policy, but rather is demanding to be convinced of the wisdom of the policy. On the other hand, deference and appropriate "leeway" are accorded where, even if the federal judge does not concur in the substantive result, the result will be upheld if there is a reasonable basis on which a properly motivated State Court could have reached it, other than pure and simple discrimination against non-residents. That is the proper test of "substantial reason" which should be applied if State court bar regulations are to be tested under the Privileges and Immunities Clause.

There can be no doubt that New Hampshire's residency requirement passes that test. New Hampshire's test is the simplest of "simple" residency requirements, without any durational requirement and attaching only at the time of admission, rather than at any earlier point in the admission process. New Hampshire residence is required, not to apply for admission, but only for admission itself.

Furthermore, the residency requirement relates directly to the full performance of other requirements the

New Hampshire Supreme Court has imposed in the course of shaping the nature and characteristics of the proper practice of law in the State. The "peculiar evils" posed by non-resident applicants can be stated in a straightforward way: nonresident attorneys, once admitted, are less likely to remain familiar with local rules and procedures and less likely to keep attuned to local conditions which may affect the needs of their local clients. Similarly, nonresident attorneys are less likely to be subject to local peer pressure which imposes informal, but powerful curbs on unethical or incompetent conduct through the regular practice of law in a relatively small and closely knit legal community. Also nonresident attorneys are less likely to be available for court appearances, disciplinary proceedings and participation in the voluntary activities of a unified bar. Each of these "peculiar evils" relates to the competence and fitness of an applicant for admission, which are clearly within the power of the State to regulate. *See, e.g., Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957).

First, since *Martin v. Walton*, 368 U.S. 25 (1961), the Court has acknowledged that the practice of law within a State enhances continuing familiarity with local rules and procedures; such familiarity is clearly integral to an attorney's competence. Thus, while successful completion of a general bar examination may, in some states, be all that is required to demonstrate competence and familiarity with local law, (*see Stolland v. South Dakota Board of Bar Examiners*, *supra*) New Hampshire imposes a higher standard for all attorneys who seek to practice in this State. See, e.g., New Hampshire Supreme Court Rule 42(7) (requiring all new admittees to take a practical

skills course within one year of admission to the bar. This higher standard cannot continue to be met by non-resident attorneys who, as a class, are less likely to appear on a regular basis in State courts; are less likely to devote a substantial portion of their practice to issues involving New Hampshire law; and are less likely to keep abreast of changes in court rules or administrative policies.

Second, the Supreme Court has expressly recognized that residency requirements may be justified where "exposure to the problems, needs and desires" of the public will facilitate the proper, and informed, exercise of power. *Chimento v. Stark*, 353 F. Supp. 1211 (1973) *aff'd. mem.* 414 U.S. 802 (1973) (seven year residency requirement for office of governor upheld). Exposure to the unique "problems, needs and desires" of New Hampshire citizens, which results from residency within the state and participation in the democratic processes of government, enhances an attorney's ability to advise local clients about how abstract principles of state and federal law will affect such clients' legal rights and obligations in light of the political, geographic and economic factors which exist in New Hampshire. This "exposure" is of "particular relevance in a small and comparatively sparsely populated state such as New Hampshire." *Id.*

Third, and no less important, a residency requirement fosters an attorney's awareness of the importance of developing a good professional relationship with judges and other lawyers in the state. While this interest may be more intangible than the more objective tests of competency, it is no less important. The high ethical standards required of an attorney can best be maintained if all members of the bar have a stake in the legal community in which they practice, and residency in the State unquestionably reinforces an attorney's interest in his or her professional reputation. *Brown v. Supreme Court of Virginia*, 359 F. Supp. 549, 561 (E.D. Va.) *aff'd. mem.* 414 U.S. 1034 (1973).

Non-resident attorneys, as a class, are less subject to the informal, yet powerful, curbs on unethical or incompetent conduct which peer pressure imposes on those who regularly practice in a relatively small legal community. The limited size of the New Hampshire bar permits such effective self-regulation by its members: "There are only about six or seven bastards in the whole state, and we all know who they are." Mayer, *The Lawyers* (1967) at p. 47 (quoting an unnamed New Hampshire judge).

Finally, a residency requirement ensures that attorneys licensed to practice by the State will be readily available for court appearances and disciplinary proceedings, a justification expressly approved by the Court in *Martin v. Walton*, *supra*. Equally important in New Hampshire, where the integrated bar depends heavily upon the active and voluntary participation of its members, is the availability of attorneys for participation on bar committees; participation in continuing legal education programs and community service activities, designed to educate members of the bar and the public alike in New Hampshire law; and representation of *pro bono* clients and indigent defendants, on either a voluntary or court-appointed basis. See, e.g., RSA 604-A (providing for court-appointed counsel for indigent criminal defendants and indigent juveniles, as well as counsel for children in neglect and abuse cases).

Although residency may not absolutely guarantee participation in these programs which are integral to the continued successful functioning of the New Hampshire bar, the admission of non-resident attorneys would ensure that the burden of sustaining these programs would fall primarily on in-state attorneys. This is simply because non-resident attorneys, as a class, are less likely to be available for such voluntary activities, particularly where the state in which they reside and practice may itself impose potentially conflicting requirements for continued licensure, *e.g.*, mandatory continuing legal education attendance or mandatory *pro bono* obligations.

Arguably, these justifications may not be fully accomplished by the New Hampshire residency requirement because attorneys who technically are residents at the time of admission may then leave the State without losing their right to practice. However, this argument ignores the fact that the New Hampshire residency requirement contemplates more than mere physical presence at the time of admission, and requires an intention on the part of the admittee that New Hampshire will be the principal place of physical presence for the indefinite future to the exclusion of all others. See Affidavit of Chief Justice King, J.A., p. 33. As this Court has consistently held, the fact that a challenged regulation cannot cover every individual case does not necessarily require its invalidation. *Dandridge v. Williams*, 397 U.S. 471, 486 (1970). Specifically, the Court has upheld bar admission rules which result in "incidental individual inequality." See, e.g., *Martin v. Walton*, 386 U.S. 25, 26 (1961); see also, *Brown v. Supreme Court of Virginia, supra* (constitutionality of residency requirement upheld even though, once licensed,

attorneys were not required to *maintain* residency or full-time office, despite the fact that 26 percent of successful applicants no longer met residency requirements). Thus, the argument that N.H. Supreme Court Rule 42 does not accomplish its stated objectives in every individual instance should not be employed to refute its intended purpose.

In dismissing these justifications, neither the opinion of Circuit Judges Bownes and Coffin nor the District Court accorded any "leeway" or deference to the New Hampshire Supreme Court's conclusions. Instead, the two Circuit Judges appeared to insist on being convinced that non-residents were less likely to retain command of local processes and conditions; were less subject to peer pressures which, through concern for reputation, tend to curb unethical or incompetent conduct; and were less likely to be available for court appearances and disciplinary proceedings. *Piper*, 723 F.2d 110, 116-117. Additionally, they referred summarily to "less burdensome" alternatives that the New Hampshire Supreme Court could impose to achieve its ends. *Id.*, p. 117. There is simply no indication in the opinion of these Judges that they did anything other than undertake a selective, conclusory evaluation of the merits of the New Hampshire Supreme Court's justifications for the residency requirement.

Indeed, the two Circuit Judges asserted that New Hampshire's failure to require continuing residency after admission "belied" the State Court's justifications. *Id.* That conclusion not only demonstrates the Judges' utter lack of deference to the New Hampshire Court's justifications; it suggests the remarkable premise that in order to

pass muster, New Hampshire's residency requirement would have to impose even greater disabilities on non-residents.

The District Court pursued the same non-deferential course, but to somewhat more elaborate lengths. For example, the District Court erroneously focused on the facts of Mrs. Piper's individual situation as a resident in a bordering state. *Piper*, 539 F.Supp. 1064, 1065 and 1074. Such a focus was inappropriate where the District Court went on to strike down the rule in its entirety. Although New Hampshire's concerns about the "peculiar evils" of admission of non-resident attorneys may have somewhat less force in the case of an applicant who lives a short distance from the New Hampshire border, they are compelling when applied to a California resident who demands the right to appear in New Hampshire courts whenever he or she happens to be on the East Coast.

Significantly, it should be noted that neither the District Court nor the two Circuit Judges even suggested any less restrictive measures by which the State court could address the perceived problems of voluntary participation in bar association programs, compliance with court orders concerning representation of indigent defendants and juveniles or the assumption of *pro bono* responsibilities. Thus, it must be assumed that actual residency indeed is a reasonable method by which such participation can be secured. Similarly, the State's concern that a non-resident will have less incentive to maintain a reputation for integrity and competence was dismissed by the District Court in one line: ". . . regard for the good reputation of the attorney . . . is a function of where an individ-

ual's heart is, not where her house is." *Piper*, 539 F. Supp. at 1072. This is simply the District Court's own value judgment. Precisely because the State *cannot* regulate where an attorney's heart is, a residency requirement is a rational means of ensuring that local peer pressure will continue to sustain an attorney's interest in his or her reputation after admission to the bar. *See Brown v. Supreme Court of Virginia*, *supra*.

The District Court's assertion that knowledge of local practice and procedure could be ensured by an expanded bar examination, mandatory practical skills courses and mandatory "linking," rather than by requiring residency at the time of admission even fails the District Court's own test. It is hard to conceive that a Hawaiian applicant would find attendance at New Hampshire's mandatory "practical skills" courses or attendance at mandatory continuing legal education courses one or more times per year any less intrusive than the present requirement. Nor would he or she find that mandatory "linking" with an experienced New Hampshire attorney to be less restrictive. Moreover, the District Court simply ignored the fact that effective mandatory practical skills courses and mandatory linking depend, for their success, upon the *voluntary* participation as faculty in such programs by experienced lawyers, well-versed in New Hampshire law and procedures. Obviously, the burden of planning and conducting such programs for the benefit of non-resident attorneys would rest upon resident New Hampshire attorneys.

Of similar quality were the District Court's suggestions that New Hampshire could enact legislation to re-

quire nonresident attorneys to appoint an agent for service of process, require the maintenance of an in-state office by non-resident attorneys or require association with local counsel as a condition to State court practice. Even assuming that these alternatives would be less burdensome for non-resident attorneys, these measures would not adequately address the concerns towards which New Hampshire Supreme Court Rule 42 is directed. While a resident agent or an instate office may facilitate service of process on a recalcitrant attorney, these alternatives cannot substitute for the powerful, informal curbs on unethical or incompetent conduct which result from practice before a limited number of judges in the closely knit legal community of the State of New Hampshire. Nor would these alternatives provide ready access by New Hampshire residents to the attorneys which the State has licensed to represent them. The option of association with local counsel by a non-resident attorney in order to represent his or her client in a particular matter is readily available to non-resident attorneys licensed to practice in another State. As this privilege is provided by court rule, New Hampshire residents are not presently denied access to out-of-state attorneys, nor are such attorneys denied access to New Hampshire courts.

Finally, the District Court's "less restrictive alternatives" in no way address the problem of participation by non-resident attorneys in the government of, or programs offered by, the New Hampshire Bar Association. While the courts of New Hampshire could conceivably appoint a Florida resident to defend an accused, or request that a Texas resident represent a juvenile on a *pro bono* basis, or ask a Georgia resident to voluntarily serve on a continuing legal education panel or a bar association committee, as a practical matter, these responsibilities to the public and to the bar could only be undertaken successfully by attorneys in New Hampshire.

Simply stated, the alternative means suggested by the District Court would not be less intrusive, and it is doubtful that such measures would be effective to ensure the competency, integrity, availability and participation of members of the New Hampshire bar.

In short, the two Circuit Judges and the District Court in fact accorded no deference whatever to the New Hampshire Supreme Court's determination that nonresidence at the time of bar admission would interfere with performance of obligations which the New Hampshire Supreme Court has determined to be essential obligations of members of the State's bar. The function of federal judges in this circumstance is not to second guess the State Court or to demand proof of the merits of the requirement, but simply to assure that the State court can adduce substantial reasons for its choice. The New Hampshire Supreme Court has done so in this case.

CONCLUSION

The Bownes-Coffin Opinion and the result reached by the District Court essentially conclude that the Privileges and Immunities Clause mandates disregard of residency for admission to the bar as a matter of federal constitutional law. No controlling decision of this Court requires

such a result and *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130 (1873) establishes that the right to control and regulate admission to the practice of law in the courts of a state is one of those powers which has not been transferred for its protection to the federal government. Accordingly, the result reached by the District Court, as approved in the Bownes-Coffin Opinion, should not be permitted to stand.

For the reasons stated, the Supreme Court of New Hampshire urges the Court to reverse the judgment of the Court of Appeals *en banc*.

Respectfully submitted,

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APPENDIX

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No. 83-1466

In The
Supreme Court of the United States
October Term, 1983

SUPREME COURT OF NEW HAMPSHIRE,
Appellant,

v.

KATHRYN A. PIPER,
Appellee.

On Appeal From the United States Court of Appeals For the First Circuit

JOINT APPENDIX

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TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Complaint	2
Motion to Dismiss (Certificate of Service Omitted)	17
Motion to Dismiss (Certificate of Service Omitted)	19
Motion for Summary Judgment (Certificate of Service Omitted)	23
Affidavit of Kathryn Piper	25
Affidavit of George Bruno	29
Affidavit of Chief Justice John W. King	32
Affidavit of Ralph H. Wood	36

Items Set Forth in Jurisdictional Statement Appendix:

Federal District Court Order on Motion for Summary Judgment	J.S.A.*	51a
Federal District Court Judgment	J.S.A.	70a
Opinion of Court of Appeals	J.S.A.	24a
Order of Court of Appeals	J.S.A.	49a
Opinions of Court of Appeals En Banc	J.S.A.	1a
Judgment of the Court of Appeals En Banc	J.S.A.	48-49a
Notice of Appeal	J.S.A.	71a
Amended Notice of Appeal	J.S.A.	72a

*Jurisdictional Statement Appendix

RELEVANT DOCKET ENTRIES

March 22, 1982	Plaintiff's Complaint
April 2, 1982	Motions to Dismiss of the Supreme Court of New Hampshire
April 16, 1982	Plaintiff's Motion for Summary Judgment
May 17, 1982	Order of Federal District Court on Plaintiff's Motion for Summary Judgment
May 18, 1982	Federal District Court Judgment for Plaintiff
May 26, 1982	Notice of Appeal to First Circuit Court of Appeals by the Supreme Court of New Hampshire
October 1, 1982	Stay of District Court Order on Plaintiff's Motion for Summary Judgment Pending Appeal to First Circuit Court of Appeals
May 25, 1983	Opinion and Judgment of First Circuit Court of Appeals reversing Federal District Court Judgment for Plaintiff
June 7, 1983	Appellee Piper's Petition for Rehearing and Suggestion for Rehearing *En Banc*
August 2, 1983	Order of First Circuit Court of Appeals granting Appellee's Petition for Rehearing and Suggestion for Rehearing *En Banc*
December 5, 1983	Evenly-divided Opinions of the First Circuit Court of Appeals *en banc*, and Judgment affirming Federal District Court Judgment for Plaintiff

December 22, 1983	Notice of Appeal to United States Supreme Court by the Supreme Court of New Hampshire
December 23, 1983	Supreme Court of New Hampshire's Motion for Stay of Mandate Pending Appeal
December 27, 1983	First Circuit Court of Appeals orders Mandate stayed pending timely appeal to United States Supreme Court
January 6, 1984	Amended Notice of Appeal to United States Supreme Court by the Supreme Court of New Hampshire
April 23, 1984	United States Supreme Court notes Probable Jurisdiction

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

C82-135 L

Kathryn A. Piper

v.

Supreme Court of New Hampshire; John W. King, Maurice P. Bois, Charles G. Douglas, III, David A. Brock, William F. Batchelder, all Justices of the Supreme Court of New Hampshire; and Ralph H. Wood, Clerk of the Supreme Court of New Hampshire

COMPLAINT

NOW COMES Plaintiff, Kathryn A. Piper, and respectfully represents as follows:

JURISDICTION

1. Jurisdiction of this Court is invoked under Title 28 U.S.C. §§1331 and 1343, this being a suit brought under Title 42 U.S.C. §1983 to secure rights guaranteed by Article IV and the Fourteenth Amendment to the United States Constitution.

2. Jurisdiction is also invoked under Title 28, U.S.C. §§2201 and 2202, this suit being for declaratory judgment of the constitutionality of New Hampshire Supreme Court Rule 42 as interpreted and applied to prohibit non-resident applicants from becoming members of the New Hampshire Bar unless they establish New Hampshire residency.

3. This Court's jurisdiction is further invoked pursuant to its power to adjudicate pendent state claims.

PARTIES

4. Plaintiff is a 1976 graduate of Suffolk University Law School, a duly accredited law school, and is admitted to practice before and is a member in good standing of the State Bar of Vermont and the United States District Court for the District of Vermont.

5. Plaintiff resides in Lower Waterford, Vermont, approximately one-half mile from the New Hampshire border.

6. The defendants in this action are the Supreme Court of New Hampshire, John W. King, Maurice P. Bois, Charles G. Douglas, III, David A. Brock, William F. Batchelder, all Justices of the Supreme Court of New Hampshire, and Ralph H. Wood, Clerk of the Supreme Court of New Hampshire. All defendants are residents of the State of New Hampshire.

7. The Supreme Court of New Hampshire is the State's court of final jurisdiction on questions of law and is responsible for the general superintendence of inferior courts.

8. The Justices of the Court are solely responsible under the New Hampshire Constitution for making rules governing the practice and procedure in all state courts.

NEW HAMPSHIRE STATUTES AND RULES GOVERNING BAR ADMISSION

9. No person shall be permitted to practice as an attorney unless admitted by the Court. New Hampshire RSA 311:7.

10. Any citizen of the age of eighteen years, of good moral character and suitable qualifications, on application to the Supreme Court shall be admitted to practice as an attorney. New Hampshire RSA 311:2.

11. New Hampshire Supreme Court Rule 42 requires that all admissions to the Bar be by examination only.

12. Rule 42 further provides that "any person domiciled in the United States and who either is a resident of the State of New Hampshire or files a statement of intention to reside in the State of New Hampshire shall be eligible to apply for examination provided he is possessed of the qualifications hereinafter provided."

13. Rule 42(8) requires the applicant to retake the bar exam unless admitted to the bar within two years of notice of passage or unless an exception is secured from the Supreme Court.

14. Except for the above provisions, Supreme Court rules and state statutes set no other residency requirements for applicants or members of the New Hampshire Bar.

COUNT I

15. In 1979, Plaintiff made application to the New Hampshire Board of Bar Examiners for permission to sit for the February 1980 New Hampshire Bar Examination.

16. Upon investigation, the New Hampshire Board of Bar Examiners found plaintiff to be of good moral character and to possess suitable qualifications, and accordingly granted her permission to sit for the February, 1980 New Hampshire Bar Examination.

17. On February 27 and 28, 1980, Plaintiff sat for the February 1980 Bar Examination.

18. By letter dated April 18, 1980, Plaintiff was advised by the New Hampshire Board of Bar Examiners that she had received a passing grade on the New Hampshire Bar Examination and that the Board of Bar Examiners would accordingly recommend her admission to the New Hampshire Bar. Plaintiff was further advised that in order to be admitted as a member to the New Hampshire Bar, she must establish a home address in New Hampshire and advise the Clerk of the Supreme Court of New Hampshire thereof prior to admission. A copy of said letter is marked Exhibit "A" and is attached hereto.

19. Although at the time she applied to take the New Hampshire Bar exam, Plaintiff had filed in good faith a statement of intention to reside in the State of New Hampshire, ensuing circumstances changed her intentions. Accordingly, on or about May 7, 1980, Plaintiff wrote a letter to Ralph H. Wood, Clerk of the Supreme Court of New Hampshire, advising him of the difficulties that would be presented by a change of residence and requesting that an exception to the residency requirement be made in her case. A copy of said letter is marked Exhibit "B" and is attached hereto.

20. By letter dated May 13, 1980, Ralph H. Wood advised Plaintiff that the Supreme Court of New Hampshire denied her request for an exception to the New Hampshire residency requirement. A copy of said letter is marked Exhibit "C" and is attached hereto.

21. By letter dated November 8, 1980, Plaintiff formally petitioned the Supreme Court of New Hampshire to

grant her an exception to the New Hampshire residency requirement. A copy of said letter is marked Exhibit "D" and is attached hereto.

22. By letter dated December 31, 1980, Ralph H. Wood notified Plaintiff that the Supreme Court of New Hampshire had denied her petition. A copy of said letter is marked Exhibit "E" and is attached hereto.

23. Throughout the application and examination process, Defendants have never questioned Plaintiff's character, education, ethical, standards or fitness to practice law. The sole reason for refusing Plaintiff admittance to the New Hampshire Bar has been her residency in the State of Vermont.

24. Defendants' actions have denied Plaintiff the opportunity to practice law in the State of New Hampshire, a property interest of fundamental importance to her right to earn a livelihood.

25. Plaintiff has suffered and will continue to suffer irreparable harm and has no adequate remedy at law.

26. Unless Plaintiff is admitted by April 18, 1982, she will be required, pursuant to Supreme Court Rule 42(8), to retake the bar examination prior to admission.

27. The Defendants' application of Rule 42 to the Plaintiff is arbitrary and capricious inasmuch as the only reference the rule makes to residency is with respect to applicants for the exam. The rule does not require that members of the Bar or those who seek to become members upon successful completion of the exam be residents of the State of New Hampshire.

28. Nevertheless, the Defendants have required Plaintiff to establish New Hampshire residency after her successful passage of the exam.

29. The action of the Defendants in denying Plaintiff the opportunity to practice law in New Hampshire on the basis of a residency requirement not set forth in the applicable Supreme Court Rule and not applied to in-state applicants or to members of the New Hampshire Bar after their admission deprives Plaintiff of a fundamental property interest without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

COUNT II

30. The Plaintiff realleges the allegations in Paragraphs 1 through 29 of this Complaint.

31. As interpreted by the Defendants, Rule 42 bars all non-resident applicants from admission to the Bar, no matter how well otherwise qualified, even though persons admitted to the Bar are permitted to continue their membership regardless of whether they have continued contact or familiarity with the State of New Hampshire or its laws.

32. This policy serves no substantial state interest and has the consequence of preventing Plaintiff from being eligible to practice law in the State of New Hampshire.

33. Rule 42 as interpreted by the Defendants violates Plaintiff's right to enjoy the privileges and immunities of citizenship as guaranteed in Article IV, §2 of the United States Constitution.

COUNT III

34. The Plaintiff realleges the allegations in Paragraphs 1 through 33 of this Complaint.

35. As interpreted by the Defendants, Rule 42 sets up a dual standard requiring establishment of residency for out-of-state applicants at the time of their admission, but not requiring residents who successfully take the exam to maintain residency at the time of their admission, or requiring any member of the Bar to maintain residency after admission.

36. Numerous members of the New Hampshire Bar are non-residents of the state who reside in other states or abroad.

37. This discrimination against out-of-state applicants serves no rational state purpose and denies Plaintiff her right to the equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

COUNT IV

38. The Plaintiff realleges the allegations in Paragraphs 1 through 37 of this Complaint.

39. Rule 42 as interpreted by the defendants places a burden upon interstate commerce in violation of Article I, §8 of the United States Constitution.

COUNT V

40. The Plaintiff realleges the allegations in Paragraphs 1 through 39 of this Complaint.

41. As a pendent state claim, Plaintiff alleges that Rule 42 as interpreted and applied by the Defendants is

in violation of the command of New Hampshire RSA 311:2 that any citizen of the age of eighteen years, of good moral character and suitable qualifications, on application to the Supreme Court shall be admitted to practice as an attorney.

WHEREFORE, Plaintiff prays this Court to:

a. Issue a preliminary injunction staying the running of the two year period provided for in New Hampshire Supreme Court Rule 42(8);

b. Issue preliminary and final injunctions enjoining the Defendants, their employees and agents, and those persons acting in concert or participation with them, from enforcing Supreme Court Rule 42 so as to require applicants for admission to the New Hampshire Bar to be residents of New Hampshire;

c. Issue preliminary and final injunctions ordering Defendants to forthwith admit plaintiff to the Bar of the State of New Hampshire;

d. To award Plaintiff her reasonable attorneys fees and costs.

Respectfully submitted,

Kathryn A. Piper
By her attorneys

LAW OFFICES OF ROBERT A. BACKUS

By: /s/ Jon Meyer, Esq.
Cooperating Attorney
New Hampshire Civil Liberties Union

Dated: March 8, 1982

EXHIBIT A

THE STATE OF NEW HAMPSHIRE

Supreme Court
Board of Bar Examiners
P.O. Box 1256, Concord, New Hampshire 03301

April 18, 1980

Ms. Kathryn A. Piper
Lower Waterford
Vermont 05848

Dear Ms. Piper:

On behalf of the New Hampshire Board of Bar Examiners I am glad to advise that you received a passing grade on the February 1980 New Hampshire Bar Examination. The Board of Bar Examiners will, accordingly, recommend your admission to the New Hampshire Bar.

The New Hampshire Supreme Court will hold a session for the purpose of admitting new members on May 28, 1980 at the Supreme Court Building in Concord. The session will begin at 10:00 A.M.

The Supreme Court has established a fee of $2.00 for issuance of a certificate of admission. Enclosed is a form setting forth the oath that will be administered to you. Please sign in the three places indicated and return the oath to the Clerk's Office together with your check for $2.00. The form and the fee should be returned so as to be received by the Clerk no later than May 16, 1980.

Also, in order to be sworn in on May 28 you must have met the New Hampshire residence qualification. If you have not already done so, you must establish a home address in New Hampshire and should advise the Clerk in

writing of that address. Again, this information should be supplied by May 16, 1980.

The United States District Court for the District of New Hampshire will hold swearing-in ceremonies to the Bar of that Court at 11:00 A.M. on May 28. The Clerk of the Federal District Court will write to you and give you information and instructions concerning admission to the Federal Court Bar.

Please accept the Board's congratulations on your success and our best wishes for a rewarding professional career in New Hampshire.

Sincerely,

/s/ Martin L. Gross, Chairman

MLG/bw

EXHIBIT B

Ralph H. Wood, Esq.
Clerk, New Hampshire Supreme Court
Noble Drive
Concord, New Hampshire, 03301

Dear Mr. Wood,

I have been advised by the New Hampshire Board of Bar Examiners that I have been recommended for admission to The New Hampshire Bar. Enclosed please find my signed oath form and a $2.00 check for the issuance of a certificate of admission.

I have been advised further that in order to be sworn in on May 28th, I must have met the New Hampshire residence qualification. I am writing to inquire as to

whether any exceptions may be made to this requirement and, if not, how much time do I have within which to meet this qualification for admission?

Aside from the questions regarding the constitutional validity of such a residency requirement, *see In the Matter of Harry G. Gordon v. Committee on Character and Fitness*, State of New York Court of Appeals, No. 482, Decided November 13, 1979, I feel that this requirement presents problems peculiar to my situation which warrant that an exception be made in my case. For a number of reasons, establishing residency in New Hampshire would result in considerable hardship to myself and my husband and appears to have little bearing on my suitability for admission to the New Hampshire Bar.

My husband and I own a house in Lower Waterford, Vermont which is situated approximately 400 yards from the Vermont-New Hampshire border. We purchased the house in 1976 and have a mortgage on the house bearing an interest rate of 8½%. We, of course, would lose the advantage of this financing and, further, suffer the effects of inflation were we forced to sell our house and purchase one in New Hampshire. In light of the present mortgage and real estate market, moving would result in a substantial financial loss. Moreover, it would constitute a major inconvenience. On April 2nd, 1980, we became parents. With such a young child we are in no position to uproot ourselves at this time.

My husband is an attorney practicing law with the firm of Downs, Rachlin & Martin in St. Johnsbury, Vermont. One of the major reasons I would like to be able to practice law in New Hampshire is the innumerable conflict of interest problems that would arise were I to enter the

private practice of law in Vermont. Downs, Rachlin & Martin, being the largest law firm in the state, would invariably be on the opposing side of a substantial number of the private civil cases which I would handle in Vermont. I am also interested in admission to the New Hampshire Bar inasmuch as I have a possible job with Thomas M. Pencost, Esq. in Littleton, New Hampshire when I choose to return to work later this year.

In light of the above I would appreciate any assistance you can give with regard to obtaining an exception to the New Hampshire residency qualification.

Thank you in advance for your consideration.

Yours truly,

/s/ Kathryn A. Piper

EXHIBIT C

May 13, 1980

Mrs. Kathryn A. Piper
Lower Waterford, Vermont

Dear Mrs. Piper:

I have your letter of May 7, 1980 concerning admission to the New Hampshire Bar and requesting an exception to the New Hampshire residency requirement. I have consulted with the Court and regret to inform you that your request will not be granted. You may be sworn in at a later date, provided you have established your New Hampshire residency within a reasonable time.

On a personal level, I regret having to give you this response since I have known Bill and worked with others at Downs, Rachlin & Martin.

Very truly yours,

Ralph H. Wood

rhw/cab

EXHIBIT D

November 8, 1980

Hon. William A. Grimes
Chief Justice
Supreme Court of New Hampshire
Concord, New Hampshire

Dear Chief Justice Grimes,

This is my formal petition to the New Hampshire Supreme Court to grant me an exception to the residency requirement for admission to the New Hampshire Bar. The circumstances upon which I rely in making my request are set forth in my letter last spring to the Honorable Ralph Wood, Clerk, a copy of which is enclosed herewith, and in the letter which the Honorable Sterry R. Waterman wrote to you on my behalf.

I do feel that I am well-qualified for admission to the New Hampshire Bar and that I will have much to contribute to the New Hampshire Bar. Furthermore, I feel that my situation is sufficiently unique that the granting of an exception in my case will not result in the setting of any undesired precedent.

I thank you in advance for your consideration of this matter.

Sincerely,

/s/ Kathryn A. Piper

EXHIBIT E

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Ralph H. Wood
Clerk of Court and
Reporter of Decisions
Carol A. Belmain
Deputy Clerk

Frank Rowe Kenison
Supreme Court Building
Concord, N.H. 03301
(603) 271-2646

December 31, 1980

Ms. Kathryn A. Piper
Lower Waterford
Vermont

Dear Ms. Piper:

I am writing in response to your letter dated November 8, 1980, addressed to Chief Justice Grimes, which you described as your "formal petition" for an exception to the residency requirement for admission to the New Hampshire Bar.

After considering your petition, the Court has instructed me to notify you that the petition is denied.

Very truly yours,

/s/ Ralph H. Woods

/pah

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE
Civil Action No. C82-135 L

KATHRYN A. PIPER,
Plaintiff,

v.

SUPREME COURT OF NEY HAMPSHIRE, JOHN W. KING, MAURICE P. BOIS, CHARLES G. DOUGLAS, III, DAVID A. BROCK, WILLIAM F. BATCHELDER, all Justices of the Supreme Court of New Hampshire; and RALPH H. WOOD, Clerk of the Supreme Court of New Hampshire,
Defendants.

MOTION TO DISMISS

NOW COMES Defendant, New Hampshire Supreme Court, by its attorneys, the Office of the New Hampshire Attorney General, and, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, moves this honorable Court to dismiss this complaint. As grounds therefore, the New Hampshire Supreme Court states as follows:

1. The New Hampshire Supreme Court is a constitutional branch of the government of the State of New Hampshire, and is therefore entitled to the protection of the Eleventh Amendment to the United States Constitution. *See, e.g. Louis v. Supreme Court of Nevada,* 490 F.Supp. 1174-80 (D.Nev. 1930); *Canfield v. Wisconsin Board of Attorneys Professional Competence,* 490 F.Supp. 1286, 1288 (W.D. Wisc. 1980).

2. Further, the New Hampshire Supreme Court is not a "person" within the meaning of 42 U.S.C. § 1983. *Louis v. Supreme Court of Nevada, supra,* 490 F.Supp. at 1180; see also *Harris v. Louisiana Supreme Court,* 324

F.Supp. 1289, 1300 (E.D. La. 1971); *Moity v. Louisiana Bar Association*, 414 F.Supp. 180 (E.D. La. 1976) *aff'd* 537 F.2d 1141 (5th Cir. 1976).

3. Accordingly, this action cannot be maintained against the New Hampshire Supreme Court, and the claims against it must be dismissed.

WHEREFORE, Defendant New Hampshire Supreme Court respectfully requests that this honorable Court:

A. Dismiss the complaint against the New Hampshire Supreme Court;

B. Grant the New Hampshire Supreme Court its costs, including reasonable attorneys' fees; and

C. Grant such other and further relief as this Court deems just and proper.

Dated: Concord, New Hampshire

April 2, 1982

Respectfully submitted,

THE NEW HAMPSHIRE SUPREME COURT

By its attorney,
Gregory H. Smith
Attorney General

UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

Civil Action No. C82-135 L

KATHRYN A. PIPER,

Plaintiff,

v.

SUPREME COURT OF NEW HAMPSHIRE, JOHN W. KING, MAURICE P. BOIS, CHARLES G. DOUGLAS, III, DAVID A. BROCK, WILLIAM F. BATCHELDER, all Justices of the Supreme Court of New Hampshire; and RALPH H. WOOD, Clerk of the Supreme Court of New Hampshire,

Defendants.

MOTION TO DISMISS

NOW COME Defendants, Supreme Court of New Hampshire, John W. King, Maurice P. Bois, Charles G. Douglas, III, David A. Brock, William F. Batchelder, all Justices of the Supreme Court of New Hampshire; and Ralph H. Wood, Clerk of the Supreme Court of New Hampshire, by their attorneys, the Office of the New Hampshire Attorney General, and move, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss this complaint. In support of their Motion to Dismiss, Defendants state as follows:

1. Plaintiff, Kathryn Piper, has challenged the constitutionality of New Hampshire Supreme Court Rule 42. Supreme Court Rule 42, as interpreted by Defendants and applied to her, requires an applicant for admission to the New Hampshire Bar to be a resident of the State of New Hampshire at the time the oath of admission set forth in New Hampshire Revised Statutes Annotated 311:6 is administered.

2. Plaintiff has alleged that Supreme Court Rule 42 violates her rights to due process and equal protection of the laws in contravention of the Fourteenth Amendment to the United States Constitution; violates her rights to enjoy the privileges and immunities of citizenship as guaranteed by Article IV, § 2 of the United States Constitution; and imposes an unconstitutional burden on interstate commerce in violation of Article I, § 8 of the United States Constitution. *See* Complaint ¶¶ 29, 33 and 39.

3. In *Wilson v. Wilson*, 416 F.Supp. 984 (D.Oregon 1976) *aff'd mem* 430 U.S. 925 (1977), an Oregon statute governing admission to the Oregon bar and rules promulgated by the Oregon Supreme Court, which required residence in Oregon at the time of the applicant's admission to the Oregon bar, were held to be constitutional.

4. On direct appeal to the United States Supreme Court from the decision of the three-judge federal district court in *Wilson v. Wilson*, the plaintiff-appellant's jurisdictional statement phrased certain of the questions presented to the Supreme Court as follows:

> "1. Whether Section 9.220(1) of the Oregon Revised Statutes and rule 1.10 of the Oregon Supreme Court Rules for Admission of Attorneys which require as interpreted by Appellees that an applicant to the Oregon bar be a resident by the time of admission:
>
> A. deprive appellant of privileges and immunities protected under Article IV, Section 2, Clause 1 of the United States Constitution; . . . or
>
> C. deprive appellant of rights secured by the due process or equal protection clauses of the XIVth Amendment to the United States Constitution."

See Juris. Statement in *Wilson v. Wilson*, O.T. 1976, No. 76-1039, pp. 3-4, cited in *Canfield v. Wisconsin Board of*

Attorneys Professional Competence, 490 F.Supp. 1286, 1289 (W.D.Wisc. 1980). Plaintiff-appellant in *Wilson v. Wilson* also raised the issue of the applicability of the interstate commerce clause before the Supreme Court. *Id* at p. 1291; *see* also 45 *U.S.L.W.* 3545.

5. On March 21, 1977, the United States Supreme Court summarily affirmed the decision of the three-judge federal district court in *Wilson v. Wilson*, 416 F.Supp. 984 (D.Oregon 1976), *aff'd mem* 430 U.S. 925 (1977). *See* 45 *U.S.L.W.* 3632 (March 21, 1977).

6. A summary affirmance by the United States Supreme Court is a rejection of the specific challenges presented in the statement of jurisdiction. *Mandel v. Bradley*, 423 U.S. 173, 176 (1977). Moreover, a summary affirmance is a disposition on the merits, and lower courts are bound by the decision of the United States Supreme Court. *Hicks v. Miranda*, 422 U.S. 332, 334-5 (1975).

7. As the precise constitutional issues raised by plaintiff in the instant case have been foreclosed by a prior decision on the merits, this court lacks jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3) to adjudicate her claims *See Duke Power Company v. Carolina Environmental Study Group*, 438 U.S. 59, 70-1 (1978). Accordingly, this action should be dismissed.

WHEREFORE, Defendants respectfully request this honorable Court to:

A. Grant their Motion to Dismiss;

B. Grant Defendants their costs, including reasonable attorneys' fees; and

C. Grant such other and further relief as this Court deems just and proper.

Dated: Concord, New Hampshire
April 2, 1982

Respectfully submitted,

SUPREME COURT OF NEW HAMPSHIRE,
ET AL.

By their attorneys,

Gregory H. Smith
Attorney General
Martha V. Gordon
Assistant Attorney General

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Civil Action
No. C82-135L

Kathryn A. Piper

v.

Supreme Court of New Hampshire: John W. King, Maurice P. Bois, Charles G. Douglas, III, David A. Brock, William F. Batchelder, all Justices of the Supreme Court of New Hampshire; and Ralph H. Wood, Clerk of the Supreme Court of New Hampshire

MOTION FOR SUMMARY JUDGMENT

NOW COMES the plaintiff herein, by her attorney, and moves this Court to grant summary judgment in her favor pursuant to Rule 56 of the Federal Rules of Civil Procedure and states as follows:

1. There is no genuine issue as to any fact stated in plaintiff's affidavit attached to her motion for a preliminary injunction.

2. Based on these allegations, plaintiff is entitled to judgment as a matter of law for the reasons stated in plaintiff's brief in support of plaintiff's motion for a preliminary injunction.

WHEREFORE, Plaintiff respectfully moves this Court to grant her Motion for Summary Judgment.

Respectfully submitted,

Kathryn A. Piper

By and through her attorneys

LAW OFFICES OF ROBERT A. BACKUS

By: /s/ Jon Meyer
Cooperating Attorney
New Hampshire Civil Liberties Union

Dated: April 16, 1982

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No.
C82-135 L

Kathryn A. Piper

v.

Supreme Court of New Hampshire: John W. King, Maurice P. Bois, Charles G. Douglas, III, David A. Brock, William F. Batchelder, all Justices of the Supreme Court of New Hampshire; and Ralph H. Wood, Clerk of the Supreme Court of New Hampshire

AFFIDAVIT

Kathryn A. Piper being first duly sworn deposes and states:

1. That she is a 1976 graduate of Suffolk University Law School, a duly accredited law school, and is admitted to practice before and is a member in good standing of the State Bar of Vermont and the United States District Court for the District of Vermont.

2. That she resides in Lower Waterford, Vermont, less than 400 yards from the New Hampshire border.

3. That in 1979, she made application to the New Hampshire Board of Bar Examiners for permission to sit for the February 1980 New Hampshire Bar Examination.

4. That upon investigation, the New Hampshire Board of Bar Examiners found her to be of good moral character and to possess suitable qualifications, and ac-

cordingly granted her permission to sit for the February, 1980 New Hampshire Bar Examination.

5. That on February 27 and 28, 1980, she sat for the February 1980 Bar Examination.

6. That by letter dated April 18, 1980, she was advised by the New Hampshire Board of Bar Examiners that she had received a passing grade on the New Hampshire Bar Examination and that the Board of Bar Examiners would accordingly recommend her admission to the New Hampshire Bar.

7. That she was further advised by the New Hampshire Board of Bar Examiners that in order to be admitted as a member to the New Hampshire Bar, she must establish a home address in New Hampshire and advise the Clerk of the Supreme Court of New Hampshire thereof prior to admission.

8. That, although at the time she applied to take the New Hampshire Bar Examination, she had filed in good faith a statement of intention to reside in the State of New Hampshire, ensuing circumstances changed her intentions.

9. That accordingly, on or about May 7, 1980, she wrote a letter to Ralph H. Wood, Clerk of the Supreme Court of New Hampshire, advising him of the difficulties that would be presented by a change of residence and requesting that an exception to the residency requirement be made in her case.

10. That by letter dated May 13, 1980, Ralph H. Wood advised her that the Supreme Court of New Hampshire denied her request for an exception to the New Hampshire residency requirement.

11. That by letter dated November 6, 1980, she formally petitioned the Supreme Court of New Hampshire to grant her an exception to the New Hampshire residency requirement.

12. That by letter dated December 31, 1980, Ralph H. Wood notified her that the Supreme Court of New Hampshire had denied her petition.

13. That throughout the application and examination process, Defendants have never questioned her character, education, ethical standards or fitness to practice law.

14. That the sole reason for refusing her admittance to the New Hampshire Bar has been her residency in the State of Vermont.

15. That due to the refusal to admit her to the New Hampshire Bar, she has been and continues to be denied the right to practice law within the State of New Hampshire, all to the detriment of her ability to earn a livelihood.

16. That unless she is admitted to the New Hampshire Bar by April 18, 1982, she will be required, pursuant to Supreme Court Rule 42(9), to retake the bar examination prior to admission.

17. That being required to retake the New Hampshire Bar Examination would cause her considerable hardship, expense and irreparable harm.

Dated at St. Johnsbury, Vermont, this 29th day of March, 1982.

/s/ Kathryn A. Piper

Subscribed and sworn to before me on this 29th day of March, 1982.

/s/ Shirley F. Achilles
Notary Public — Vermont

My commission expires:
2-10-83

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action
No. C82-135L

Kathryn A. Piper

v.

Supreme Court of New Hampshire: John W. King, Maurice P. Bois, Charles G. Douglas, III, David A. Brock, William F. Batchelder, all Justices of the Supreme Court of New Hampshire; and Ralph H. Wood, Clerk of the Supreme Court of New Hampshire

AFFIDAVIT

I, George Bruno, being duly sworn, do depose and state as follows:

1. I am the editor of the *1982, New Hampshire Law Directory & Daybook*.

2. The above volume contains an alphabetical listing of the members of the New Hampshire Bar with their business addresses.

3. That listing is attached to this affidavit.

4. The addresses are based upon the official records of the New Hampshire Bar Association.

5. I personally verified those addresses which were in doubt.

Dated: April 23, 1982

/s/ George Bruno

STATE OF NEW HAMPSHIRE
MERRIMACK, SS.

The foregoing instrument was acknowledged before me this 23rd day of April, 1982, by George Bruno.

/s/ Robert I. Rawls
Notary Public/Justice of the Peace

OUT-OF-STATE ATTORNEYS ADMITTED TO PRACTICE IN NEW HAMPSHIRE BASED UPON 1982 NH LAW DIRECTORY & DAYBOOK

Illinois	7
Massachusetts	96
Ohio	4
Washington, D.C.	24
Florida	9
Pennsylvania	6
Rhode Island	6
New York	14
Connecticut	10
Texas	2
Vermont	13
Virginia	18
Oregon	1
Maine	19
Colorado	1
Kansas	1
California	10
Arizona	2
Iowa	1
Minnesota	1
Kentucky	2
West Virginia	2
North Carolina	1
Alabama	1
Missouri	1
Maryland	5
Nebraska	1
Louisiana	1

Virgin Islands	1
Michigan	1
South Carolina	1
New Jersey	5
Hawaii	1
Utah	1

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE
Civil Action No. C82-135-L

KATHRYN A. PIPER,
Plaintiff,

v.

SUPREME COURT OF NEW HAMPSHIRE, ET AL.,
Defendants.

AFFIDAVIT OF JOHN W. KING

I, John W. King, being duly sworn, do hereby depose and state:

1. I, John W. King, am Chief Justice of the New Hampshire Supreme Court.

2. The judicial power of the State of New Hampshire is vested in the New Hampshire Supreme Court, the Superior Court and such lower courts as have been, or may be, established by the Legislature. *See* New Hampshire Constitution, Part 2, Article 72-a.

3. The New Hampshire Supreme Court has inherent power, as well as statutory authority under RSA 311:8, to regulate attorneys for the protection of the public and the maintenance of public confidence in the bar.

4. As consistently interpreted by the New Hampshire Supreme Court, RSA Ch. 311 and Supreme Court Rule 42 require that an applicant for admission to the New Hampshire Bar be a *bona fide* resident of the State of New Hampshire at the time that the oath of office set forth in RSA 311:6 is administered. The oath of office includes the fact that the attorney will be an officer of the court *and* must support the Constitution of this State. RSA 311:

6. Nonresidents could hardly be expected to carry out these solemn duties.

5. As interpreted by the New Hampshire Supreme Court, the residency requirement involves more than mere physical presence in the State of New Hampshire at the time of admission. "Residency," for purposes of admission to the Bar, contemplates that an applicant intends that the State of New Hampshire will be his or her "[p]rincipal place of physical presence for the indefinite future to the exclusion of all others." *Cf.* RSA 21:6.

6. The requirement of actual residency at the time of admission to the New Hampshire Bar promotes the State of New Hampshire's interest in ensuring that attorneys admitted to practice will become, and remain, familiar with local rules and practices. Attorneys who have indicated, under oath, that they intend to reside in New Hampshire for the indefinite future are clearly more likely to become familiar with the laws and rules of the State of New Hampshire. That the State of New Hampshire demands such familiarity with local practice and procedure, above and beyond the knowledge of substantive law required for the bar examination, from attorneys admitted to the New Hampshire Bar is reflected in the New Hampshire Supreme Court's rule requiring all new admittees to complete a practical skills course within one year of admission. *See* Supreme Court Rule 42(7).

7. The residency requirement also ensures, to the extent possible, that attorneys admitted to practice in the State of New Hampshire maintain high standards of ethics, as well as competency, as residency within the State reinforces a practicing attorney's interest in his or her reputation as a lawyer in the legal community.

8. The residency requirement facilitates the State's interest in ensuring that all attorneys are readily available for court proceedings and easily subject to disciplinary action by the New Hampshire Supreme Court.

9. The residency requirement promotes the continued vitality of a competent, stable and well informed State Bar. The New Hampshire Bar is an integrated bar which depends heavily on the active participation of all of its members in its efforts to improve the quality and extent of legal services offered within the State of New Hampshire. In the absence of a residency requirement, the burden of providing those voluntary services currently provided by members of the New Hampshire Bar in such areas as participation on bar association committees; presentation of continuing legal education programs; participation in significant *pro bono* cases on a volunteer basis; and participation in community programs designed to afford information to the public about the services offered by the New Hampshire Bar; would fall disproportionately on those members of the Bar who happen to reside within the State. Similarly, the burden of handling court-appointed cases, such as those required under the indigent defense program, would, as a practical matter, fall on resident members of the New Hampshire Bar.

10. Apart from the residency requirement itself, applicable to all applicants for admission, the New Hampshire Supreme Court imposes no other requirements upon residents of other states who seek admission to the New Hampshire Bar. The qualifications required for admission, and the fees imposed, are identical for resident and non-resident applicants.

/s/ John W. King

Sworn to and subscribed before me this 5 day of May, 1982.

/s/ Charles G. Douglas III
Justice of the Peace

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE
Civil Action No. C82-135-L
KATHRYN A. PIPER,
Plaintiff,

v.

SUPREME COURT OF NEW HAMPSHIRE, ET AL.,
Defendants.

AFFIDAVIT OF RALPH H. WOOD

I, Ralph H. Wood, being duly sworn, do hereby depose and state:

1. I, Ralph H. Wood, am Clerk of the New Hampshire Supreme Court. I was appointed to this position on May 1, 1980.

2. My duties as Clerk of the New Hampshire Supreme Court include processing applications for admission to the New Hampshire Bar; advising applicants as to the requirements for admission to the New Hampshire Bar; and ensuring that prior to admission to the New Hampshire Bar, applicants who have successfully completed the bar examination establish bona fide residency in the State of New Hampshire. I am also custodian of the records of the New Hampshire Supreme Court.

3. Pursuant to Supreme Court Rule 42(3), an applicant for admission to the New Hampshire Bar is eligible to take the bar examination if he or she is either a resident of the State of New Hampshire at the time of application to take the bar examination, or files a statement of intention to become a resident of the State of New Hamp-

shire, provided said applicant has satisfied the other requirements set forth in Supreme Court Rule 42(4).

4. Upon successful completion of the bar examination, an applicant is notified by the Board of Bar Examiners that, in order to be admitted to the New Hampshire Bar, the applicant must establish residency in New Hampshire. *See, e.g.* Plaintiff's Complaint, Exhibit A. An applicant who has not established residency is required to notify the Clerk of the New Hampshire Supreme Court in writing of his or her New Hampshire address prior to the formal administration of the oath of admission set forth in RSA 311:6. *Id.*

5. In addition, each applicant who has successfully completed the New Hampshire Bar examination is required to execute the written oath of office, which is provided by the Board of Bar Examiners to the applicant, and return the written oath to the Clerk of the New Hampshire Supreme Court, prior to the formal administration of the oath. *See* Plaintiff's Complaint, Exhibit A. The written oath form provided to the applicant requires the applicant to state his or her New Hampshire address. *See* Exhibit A, attached hereto.

6. It is my responsibility to review the written oaths submitted to me by successful applicants to ensure that each applicant has indicated under oath that he or she is a resident of the State of New Hampshire. If the form (Exhibit A) sets forth an out-of-state residence, I do not certify to the Supreme Court that the applicant is eligible for admission to the New Hampshire Bar.

7. In order to ensure that applicants for admission to the New Hampshire Bar do not circumvent the require-

ment of bona fide residency in New Hampshire at the time of admission by, *e.g.*, using an in-state mailing address, the New Hampshire Supreme Court has recently required an applicant to advise the Clerk of the New Hampshire Supreme Court of his or her actual residence, as well as his or her mailing address, on a form provided by the Supreme Court of New Hampshire. *See* Exhibit B, attached hereto. This form was not in use at the time of plaintiff's application for admission to the New Hampshire Bar.

8. According to the official records of the New Hampshire Supreme Court, plaintiff, Kathryn Piper, requested information from the New Hampshire Supreme Court concerning the residency requirements for admission to the New Hampshire Bar by letter dated July 25, 1979. *See* Exhibit C, attached hereto. Her concerns about her ability to satisfy the residency requirement, set forth in Exhibit C, are virtually identical to the reasons given by her when she requested an exemption from the residency requirement, following her successful completion of the New Hampshire Bar examination. *See* Plaintiff's Complaint, Exhibit B.

9. Plaintiff was advised by the New Hampshire Supreme Court, in advance of her application to take the New Hampshire Bar examination, that she would not be admitted to the New Hampshire Bar until she had established residency in New Hampshire. *See* Exhibit D, attached hereto.

10. The Petition and Questionnaire for Admission to the Bar of New Hampshire, executed by plaintiff on October 28, 1979, stated: "Admission to the bar will not be permitted until applicant proves good faith residency in

the sense of domicile in New Hampshire." *See* Exhibit E, attached hereto.

11. Plaintiff stated, under oath, in said Petition that that she intended to become a resident of Littleton, New Hampshire by April, 1979 [*sic*]. *Id.*

12. According to records maintained by the New Hampshire Supreme Court, admissions to the New Hampshire Bar have increased significantly over the past twenty years, despite the existence of a residency requirement. *See* Exhibit F, attached hereto.

13. I hereby certify that the documents attached hereto as Exhibits A through E are true and accurate copies, and further, that the figures set forth in Exhibit F are accurate.

/s/ Ralph H. Wood

Subscribed and sworn to before me this 6th day of May, 1982.

/s/ Donna Rae Craig
Notary Public

DONNA CRAIG, Notary Public
My Commission expires No. 10, 1986

(seal)

EXHIBIT A

I, , of in the County of and State of New Hampshire, do solemnly swear that I will bear faith and true allegiance to the United States of America and the State of New Hampshire, and will support the constitutions thereof, So help me God.

I solemnly swear that I will do no falsehood, nor consent that any be done in the court, and if I know of any, I will give knowledge thereof to the justices of the court, or to some of them, that it may be reformed; that I will not wittingly or willingly promote, sue, or procure to be sued any false or unlawful suit, nor consent to the same; that I will delay no man for lucre or malice, and will act in the office of any attorney within the court according to the best of my learning and discretion, and with all good fidelity as well to the court as to my client. So help me God.

The State of New Hampshire

At the session of the Supreme Court, holden at Concord on , 19
having been examined and qualified for admission to the bar, in accordance with the rules of the court, and having in open court on that day subscribed and taken the foregoing oaths;

IT IS ORDERED: That (s)he be, and (s)he is accordingly, admitted to practice as an attorney in the courts of this state.

Attest:
_____Clerk

SC-B3-82

EXHIBIT B

Ralph H. Wood, Clerk
New Hampshire Supreme Court
Frank R. Kenison Supreme Court Building
Noble Drive
Concord, NH 03301

Dear Mr. Wood:

In connection with my petition for admission to the New Hampshire bar, I enclose the signed form of oath and my check for five dollars ($5.00) payable to "State of New Hampshire" in payment of the fee for issuance of a certificate of admission.

I also hereby inform the Court that my residential and mailing addresses are as follows:

Location of Residence	Mailing Address
No. Street/Road	P.O. Box; No. Street/Road
City or Town	City or Town Zip Code

Very truly yours,

_____
Signature

Dated: _____
SC-Res-82

EXHIBIT C

(Filed July 27, 1979)

July 25, 1979

Dear Mr. Puppagianis,

I am writing to inquire about the State of New Hampshire's requirements for admission to the Bar and to re-

quest an application to sit for the New Hampshire State Bar Examination in February, 1980.

I am an attorney, admitted to practice before the Vermont Bar in February, 1977. I am presently employed as a law clerk by the Second Circuit Court of Appeals. My husband is also an attorney and is practicing with the law firm of Downs, Rachlin & Martin in St. Johnsbury, Vermont. My husband and I presently reside in Lower Waterford, Vermont where we own a home near the Connecticut River.

Due to the innumerable conflict of interest problems that would arise should I enter the private practice of law in the same town as my husband, I have decided that I would like to seek employment in New Hampshire upon termination of my clerkship with the Second Circuit this fall.

My main concern, of course, is satisfaction of the residency requirement. Moving to New Hampshire between now and February would present a considerable hardship for my husband and myself due to the tight mortgage market and due to the fact that we are expecting a child in the middle of March.

I am wondering whether any exceptions can be made to the residency requirement and, if not, what exactly constitutes "residency" for the purpose of admission to the New Hampshire Bar. Any information which you could supply me with respect to this matter would be most appreciated.

Thank you in advance for your consideration.

Sincerely,

/s/ Kathryn A. Piper
Lower Waterford, Vt., 05848

EXHIBIT D

1979

August 6

Mrs. Kathryn A. Piper
Lower Waterford, Vermont 05848

Dear Mrs. Piper:

You may take the New Hampshire bar examination without being a resident of New Hampshire. The supreme court rules require that, when you petition for leave to take the bar examination, you be a resident or state that you intend to become a resident.

When you pass the bar examination, the oath of office will be administered to you after you have established your residence in New Hampshire, and you may do this a year or so after you have passed the examination.

Very truly yours,

George S. Pappagianis

GSP/jd

EXHIBIT E

SUPREME COURT OF NEW HAMPSHIRE PETITION AND QUESTIONNAIRE FOR ADMISSION TO THE BAR OF NEW HAMPSHIRE

NOTICE TO APPLICANT:

1. Fill out, sign and make affidavit to this form. Print legibly or use typewriter.
2. The applicant's attention is directed to the provision of the rules that specifically places the burden of proof

upon the applicant to establish good moral character and that justifies a finding that applicant has not met this burden if applicant fails to answer any question on this form (as well as any related question propounded by the committee on character and fitness or the Supreme Court). The application will be summarily rejected if all questions on the form are not fully answered. Answer "none' 'or "not applicable" or with other suitable descriptive wording where pertinent.

3. Two copies must be submitted of college diplomas or certificates of law school diplomas or certificates, of military service discharge certificates and of other official documents.

4. Before completing this application, it will be necessary for you to read the Code of Professional Responsibility.

Date: October 28, 1979

1(a) State full name Piper Kathryn Aring
Last First Middle

(b) Social Security Number 287-62-4205
Driver's License VT. P00579691264383051

(c) Have you ever used or been known by any other name?
yes
yes or no

If so, state in full each name used or by which you have at any time been known and the reasons for each name. my maiden name was Kathryn Burch Aring

(d) If your name has ever been changed, state former name and when, how and why, change was made. If change was made in a proceeding, annex a certified copy of the order or other appropriate evidence of change. See 1(c); date of marriage—12/30/72

(e) What is your mailing address and zip code: Lower Waterford, Vt. 05848

(f) Are you a citizen of the United States? yes
yes or no

If claiming citizenship other than by birth in the United States, state the basis of such claim and exhibit proof. If naturalized, state the date and name and location of the Court with a Number of Certificate and the Petition Number. not applicable

(g) If you are not a resident of New Hampshire, give the date by which you intend to become a resident and the name of the municipality in which you intend to reside: April, 1979 Littleton, N.H.

Admission to the bar will not be permitted until applicant proves good faith residency in the sense of domicile in New Hampshire.

(h) State your employment for the past five years including part-time employment:

Hon. Sterry R. Waterman 9/15/78 9/1/79
Circuit Court of Appeals
Box 368, St. Johnsbury, VT 05819

Defender General of Vermont 9/76 9/78
State Office Building, 141 Main St.
Montpelier, VT 05602

Thomas M. Pancoast, Esq. 10/1/79 - present
52 School St., Littleton, NH

Downs, Rachlin & Martin 8/2/76 9/76
9 Prospect St., St. Johnsbury, VT 05819

Middlebury College, Middlebury, VT
Summers of 1973-1974

2. (a) Date of birth 8-3-51

(b) Place of birth Milwaukee, Wisconsin U.S.A.
City or Town State Country

3. (a) My father's name is Charles William Aring, *Jr.*

   (b) He is living.

   (c) His business address is c/o Aring Equipment Co., 1300 West Silver Spring Drive, P.O. Box 38, Butler, Wisc. 53007

   (d) His residence address is 1900 West Dean Road, Milwaukee, Wisconsin 53255.

4. (a) My mother's name is Dorothy Blodgett Aring.

   (b) She is living.

   (c) Her business address is not applicable.

   (d) Her residence address is 1900 West Dean Road, Milwaukee, Wisconsin; 53255.

5. My parents have engaged in the following business or businesses during the past ten years:

   Business Aring Equipment Company. Location and Street Address 13001 West Silver Spring Drive, P.O. Box 38, Butler, Wisconsin 53007.

6. The following constitutes every residence, address and place where I have lived within the last ten years:

   R.F.D., Lower Waterford, VT 12/76-present

   22 Boynton Avenue, St. Johnsbury, VT 9/76 to 12/76

   Wallhouse #2, Burke Mt. Condominiums, Burke, Vt. 8/76 to 9/76

7. My education was received as follows:

   (a) Junior High School (or elementary, if no Junior High):

      (1) University School of Milwaukee—7th and 8th grade From 9/1963, to 6/1965.

      (2) Bayside School, Milwaukee, Grades 1-6.

   (b) High School:

      (1) University School of Milwaukee From 9/1965 to 6/1969.

      Graduated? Yes.

   (c) College or University:

      (1) Name and Location: Middlebury College. From 9/1969 to 6/1971.

      (2) Univ. of Wisconsin — Madison. From 9/1971 to 12/1972.

      Received Degrees? Yes.

      If so, what Degrees? B.A.

      Remarks: Honors, etc. Graduated in top 10% of class.

      Attach copy of diplomas, or certificate of graduation signed by college registrar.

   (d) Law School:

      (1) Name and Location: Suffolk University Law School. From 9/1973, to 6/1976.

      Received Degrees? Yes.

      If so, what Degrees? Juris Doctor.

      Remarks: Honors, etc.: Dean's list summer of 1975 and 1975-1976.

      Attach copy of diploma, or certificate of graduation signed by law school registrar.

8. Have you ever been dropped, suspended, placed on probation, expelled or requested to resign from any school, college, university or law school, or requested or advised by any such school or institution to discontinue studies therein? No. If so, state the cause, circumstances, and date of each such occurrence. Not applicable.

9. Have you ever served in the armed forces of the United States? No.

   If so and you have been discharged, annex a certified copy or a photostatic copy of the document evidencing the discharge. Not applicable.

10. (a) During the last five years I have traded and established credit with the following:

    Howard Bank;

    Main St., St. Johnsbury 05819;

    1976 to present.

    (b) I presently owe money for educational loans or money which has been due for more than 90 days or both to the following: Not applicable.

    Name and address of creditor: None.

    (c) Have any judgments or contempt orders ever been entered against you? No.

    (d) Are there any unsatisfied judgments or contempt orders outstanding against you? No.

Return Both White And Canary Copies To Supreme Court Clerk.

11. The following is a complete list of all suits in equity, actions at law suits in bankruptcy or other statutory proceedings, matters in probate, lunacy, guar-

dianship, and every other judicial or administrative proceedings of every nature and kind, except criminal proceedings, to which I am or have ever been a party: None.

12. The following is a complete record of all criminal proceedings (including traffic violations currently classified in New Hampshire as misdemeanors or greater) to which I am or have ever been a party (except for proceedings, if any, in which a record of conviction and sentence has been annulled pursuant to statute): None.

13. (a) Have you ever been refused a fidelity, surety, or other bond? No.

    If so, state facts and circumstances.

    (b) Has anyone ever sought to cancel or recover under a fidelity or surety bond covering you? No.

    If so, state facts and circumstances.

14. Have you ever been discharged or requested to resign from any employment? No. If so, state the circumstances and the name and address of employer.

15. Are you or have you ever been addicted to the use of narcotics, drugs or intoxicating liquors? No. If so, state the details.

16. Have you within the past ten years undergone treatment for or consulted any doctor about the use of drugs, narcotics or intoxicating liquors? No. If so, state the details, circumstances and names and present addresses of the doctors so consulted. I have directed each of the foregoing doctors to furnish directly to the Court any information requested by the Court in respect to any such treatment.

17. The following five persons have known me well for at least five years immediately prior to the date of this Questionnaire:

Alison Sommers, 22 Cedar St., Somerville, Mass. 02140; Dr. Debbra Erdmann, 1901 Linden, Nashville, Tenn. 37212; Dr. Richard Fritz, 810 W. Acacia Rd., Milwaukee, Wis. 53217; Caroline Chester Hyde, Sweetser Road, Pownal, Maine 0069; Mrs. William Murphy, 7319 N. Bridge Lane, Milwaukee, Wis. 53217.

18. (a) Have you previously applied for admission to the bar in this State? No.

If so, state when and the disposition made of the application.

(b) Have you ever made application for admission to the bar in any other state or jurisdiction? Yes.

If so, state when, where and the disposition made of such application. 1976, Vermont, admitted to Vt. Bar February 1, 1977.

19. Have you ever been disbarred, suspended from practice, reprimanded, censured or otherwise disciplined or disqualified as an attorney or member of any profession or organization, or holder of any office, public or private? No. If so, state on a separate sheet the dates, the facts, the disposition of the matter, and the name and address of the authority in possession of the record.

20. If you are currently a member of the bar in any state or the District of Columbia, please furnish:

(a) Certificate of admission in such state or district;

(b) Certificate of Clerk of Court having jurisdiction over such admission that you are a member in good standing.

21. Do you advocate the overthrow of the Government of the United States or that of any state by force and violence? No.

I HEREBY CERTIFY THAT I HAVE READ THE CODE OF PROFESSIONAL RESPONSIBILITY.

/s/ Kathryn A. Piper
Signature of Applicant

I UNDERSTAND THAT THIS QUESTIONNAIRE IS OF A CONTINUING NATURE AND THAT I MUST GIVE CORRECTLY AND FULLY THE INFORMATION HEREIN SOUGHT AS OF THE DATE OF MY APPEARANCE TO BE SWORN IN AS AN ATTORNEY. I WILL, THEREFORE, BEFORE SUCH APPEARANCE, NOTIFY THE COURT AS TO ANY CHANGE IN RESPECT TO ANY MATTER IN REGARD TO WHICH INFORMATION IS HEREIN SOUGHT, AS TO ANY FACTS HEREAFTER DEVELOPED, AND AS TO ANY SUBSEQUENT INCIDENT WHICH MAY HAVE ANY BEARING UPON ANY INFORMATION HEREIN SOUGHT.

/s/ Kathryn A. Piper
Signature of Applicant

State of Vermont)
County of Caledonia) ss.

On this the 29th day of October, 1979, before me, the undersigned officer, personally appeared Kathryn A. Piper, to me personally known (or satisfactorily proven to be) the person whose name is affixed to the attached questionnaire, and made oath that the statements therein contained are true to the best of his knowledge and belief.

/s/ William B. Piper
Notary Public

(My Commission Expires 2/10/83)

Return Both White And Canary Copies To Supreme Court Clerk.

NOTICE TO APPLICANT

THE TWO SIGNERS TO THE FOLLOWING CERTIFICATE MUST BE ABLE TO ATTEST TO THE APPLICANT'S GOOD MORAL CHARACTER. THEY MAY BE, IF NECESSARY, TWO OF THE FIVE REFERENCES FURNISHED IN ANSWER TO QUESTION 17.

1. We are not related by blood or marriage to Kathryn Aring Piper who is seeking admission to the Bar of New Hampshire.

2. We have known said applicant the number of years shown after our respective signatures, and know applicant to be of good moral character.

3. We have no knowledge that said applicant has been guilty of any criminal or disgraceful acts.

Signature of certifier: /s/ John L. Primer. Years known: 5.

Address of certifier, if certifier's address is not listed in answer to question No. 17: Danville Road, St. Johnsbury, VT 05848.

Signature of certifier: /s/ James C. Gallagher. Years Known: 4.

Address of certifier, if certifier's name is not listed in answer to question No. 17: Lyndon, Vermont.

FOR OFFICE USE ONLY

Character & Fitness Approval	Yes	No
For Approval	Yes	No
Has Received: Filing	$.75	11/26/79 Date
Character & Fitness	$100.-	11/26/79 Date
Number of times examination previously taken	—0—	
	Years and moves	

Return Both White And Canary Copies To Supreme Court Clerk.

AUTHORIZATION AND RELEASE

I, Kathryn Aring Piper, born at Milwaukee, Wisconsin on 9-20-51, having filed an application for admission to the bar of New Hampshire, do hereby consent to have an investigation made by or on behalf of the Board of Bar Examiners, State of New Hampshire, and/or the Character and Fitness Committee of the New Hampshire Supreme Court as to my moral character, reputation and fitness for the practice of law. I agree to give any further information which may be required in reference to my past record. I understand that if there is an adverse determination by a Character and Fitness Committee, the contents of the report will be disclosed to me, otherwise, I will not be entitled to disclosure of such contents and the same will be privileged.

I also authorize and request every person, firm, company, corporation, governmental agency, court, association or institution having control of any documents, records and other information pertaining to me, to furnish to the Board of Bar Examiners for subsequent use by the Character and Fitness Committee or directly to the Character and Fitness Committee any such information, including documents, records, bar association files regarding charges or complaints filed against me, formal or informal, pending or closed, or any other pertinent data, and to permit the Board of Bar Examiners and/or the Character and Fitness Committee, or any of their agents or representatives, to inspect and make copies of such documents, records and other information.

I authorize the Board of Bar Examiners and/or the Character and Fitness Committee to obtain any information from my official record on file with Local Board Number _____ of the Selective Service System, located in the City of _____, State of _____, and further authorize the Department of the _____ to furnish
Army, Navy, Air Force
the Board of Bar examiners and/or the Character and Fitness Committee, the record of each period of my service therein, and to furnish my service record for each period; and do hereby consent to and authorize the release of such information by the Selective Service System and Department of the _____. My serial
Army, Navy, Air Force
number was _____

As an inducement to the Board of Bar Examiners and/or the Character and Fitness Committee to investigate

and reach a determination respecting my moral character, reputation and fitness for the practice of law, I hereby release, discharge and exonerate the Board of Bar Examiners and the Character and Fitness Committee, their agents and representatives, from any and all liability of every nature and kind arising out of any such investigation or out of the furnishing, inspection or use of such documents, records, and other information.

I have read the foregoing document and have given all information fully and frankly. The information is complete and is true of my own knowledge.

/s/ Kathryn A. Piper
Notary Public

State of Vermont, County of Caledonia, ss.

Subscribed and sworn to before me this 28th day of October A.D., 1970.

/s/ William B. Piper
Notary Public

Return Both White and Canary Copies To
Supreme Court Clerk

STATE OF VERMONT

SUPREME COURT

CERTIFICATE OF ADMISSION AND
GOOD STANDING

This is to CERTIFY that KATHRYN A. PIPER, Esq., of St. Johnsbury, County of Caledonia, State of Vermont, was upon examination and recommendation of the bar by its Examining Committee, duly admitted and sworn as an Attorney and Counsellor of Law, and as such was enrolled on the 1st day of February, 1977.

This is to FURTHER CERTIFY that the said KATHRYN A. PIPER, Esq., is presently in good standing before the Supreme Court of Vermont.

Dated at Montpelier, County of Washington, State of Vermont, this 31st day of October, 1979.

(S E A L)
State of Vermont
Supreme Court

/s/ Anthony E. Otis
Anthony E. Otis, Deputy Clerk
Vermont Supreme Court

(S E A L)
Suffolk University
1906
(Received November 26, 9:51 AM '7)
New Hampshire
Supreme Court

Suffolk University Law School - Beacon Hill - Boston, Massachusetts 02114

(617) 723-4700

November 2, 1979

Kathryn A. Piper
Star Route
Lower Waterford, VT. 05848

To Whom It May Concern,

This is to certify that Kathryn A. Piper graduated from Suffolk University Law School on June 13, 1976.

Sincerely,

/s/ Lorraine D. Cove
Registrar

(SEAL)

LDC/vak

University of Wisconsin
Madison

Office of the Registrar
Peterson Office Building
750 University Avenue
Madison, Wisconsin 53706

Dorothy Igl Stepien
Assistant Registrar
Records and Certification

November 8, 1979

To Whom It May Concern

RE: Kathryn Aring Piper

The above named student was granted the following degree(s) from the University of Wisconsin—Madison, having completed fully and in a satisfactory manner all of the degree requirements:

DATE	DEGREE
May 19, 1973	Bachelor of Arts

/s/ Dorothy Stepien eg
Dorothy Igl Stepien
Assistant Registrar
Records & Certifications

DIS:ilh

EXHIBIT F

ADMISSIONS TO THE BAR

Year	No. Admitted*
1962	24
1963	30
1964	28
1965	31
1966	29
1967	29

1968	40
1969	43
1970	50
1971	44
1972	92
1973	102
1974	97
1975	99
1976	125
1977	101
1978	175
1979	127
1980	151
1981	119
TOTAL	1,536

067K/ph

* These figures include only those individuals, admitted to the Bar, who are currently members of the Bar in good standing.

AMICUS CURIAE

BRIEF

Office - Supreme Court, U.S.
FILED
JUN 16 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1466

In The
Supreme Court of the United States
October Term, 1983

SUPREME COURT OF NEW HAMPSHIRE,
Appellant,

v.

KATHRYN A. PIPER,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE STATE OF IOWA AS AMICUS CURIAE IN SUPPORT OF APPELLANT

THOMAS J. MILLER
Attorney General of Iowa

*HENRY R. ARNS,
Deputy Attorney General

Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-5164

Attorneys for Amicus Curiae State of Iowa

*Counsel of Record

CICERO LAW BRIEF PRINTING CO., (800) 635-7427 Ext. 555

BEST AVAILABLE COPY

QUESTION PRESENTED

WHETHER A STATE RESIDENCY REQUIREMENT FOR ADMISSION TO THE LOCAL BAR VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV OF THE CONSTITUTION.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	ii
Interest of Amicus Curiae	1
Summary of Argument	2
Argument	2
Conclusion	10
Appendix A	App. 1
Appendix B	App. 6

TABLE OF AUTHORITIES

Cases

Bates v. State Bar of Arizona, 433 U.S. 350 (1977)	9
Bradwell v. Illinois, 83 U.S. (16 Wall) 130 (1873)	9
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)	9
In re Lockwood, 162 U.S. 116 (1894)	9
Piper v. New Hampshire, 539 F.Supp. 1064 (D. New Hampshire 1982), *aff'd* 723 F.2d 110 (1st Cir. 1983) (en banc)	2

Statutes

Iowa Code § 46.7	4
Iowa Code § 610.1	1
Iowa Code § 610.11	9
1982 Iowa Acts, Ch. 1260	7

Court Rules

Canon 1	4
Canon 2	4

TABLE OF AUTHORITIES—Continued

	Page
Iowa Code of Professional Responsibility,	
Canon 3	4
Canon 7	6
Canon 8	4
DR 1-103	4
DR 7-106	6
EC 2-27	4
EC 8-1	4
EC 8-2	4
Iowa Court Rule 105	1, 6
Iowa Court Rule 116	9
Iowa Court Rule 121	5, 7
Iowa Court Rule 123	5

Other

"Chipping Away at Mountains of Paperwork," 67 A.B.A.J. 834-35 (1981)	6
In Re Legal Services to the Poor, Misc. Res. (Iowa S.Ct. Nov. 25, 1981)	4
In Re Matter of the Enforcement of Supreme Court Rule 123.4, Misc. Or. (Iowa S.Ct. July 15, 1983)	5
Legal Services for the Poor, Office of the Governor (Iowa, Jan. 1982)	7
The News Bulletin of the Iowa State Bar Assoc., Vol. 42:12 (Dec. 1982)	8

No. 83-1466

In The
Supreme Court of the United States
October Term, 1983

SUPREME COURT OF NEW HAMPSHIRE,
Appellant,

v.

KATHRYN A. PIPER,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE STATE OF IOWA AS AMICUS CURIAE IN SUPPORT OF APPELLANT

INTEREST OF AMICUS CURIAE

The State of Iowa licenses and regulates attorneys pursuant to its police power primarily through rules adopted by the Iowa Supreme Court pursuant to Iowa Code § 610.1 (1983). In its rules, Iowa has established a generally applicable residency requirement for admission to the state bar. Iowa Court Rules 116. Appendix A at 4 (hereinafter App. A).

In the case at bar, this Court is reviewing the validity of a district court judgment, affirmed by an equally divided Court of Appeals, which strikes down the State of New Hampshire's residency requirement for bar admission. *Piper v. New Hampshire*, 539 F.Supp. 1064 (D. New Hampshire 1982), *aff'd* 723 F.2d 110 (1st Cir. 1983) (en banc). Because Iowa has a direct interest in the outcome of this case, it seeks leave to file this brief urging reversal of the opinion of the Court below.

SUMMARY OF ARGUMENT

A residency requirement for admission to the state bar furthers legitimate, nonprotectionist state interests in promoting lawyers' identification with the state legal system, in encouraging compliance with local state court rules, and in effectively regulating the profession. These constitutionally cognizable state interests outweigh any purported insult to Article IV principles of national citizenship which supposedly results from enforcement of a residency requirement for bar admission.

ARGUMENT

In our view, the central issue in this important privileges and immunities case is not primarily definitional or talismanic. Rather, as is often the case in constitutional adjudication, the question here involves balancing competing constitutional interests in the context of a specific case or controversy.

As a result, Iowa does not reach into the cornucopia of privilege and immunities law to select cases that justify prescriptive advice favorable to residency requirements for bar admission. Instead, Iowa simply wishes to alert the Court to the depth of the interests which support its residency requirement and press its view that these interests outweigh any purported insult to Article IV principles of national citizenship that result from its enforcement.

First, Iowa believes that a residency requirement for lawyers tends to insure that members of the state bar have a high degree of identification, fidelity, and familiarity with the state bar, the state judiciary, and, indeed, the state legal system generally. Unlike resident attorneys who are immersed in the mainstream of local life, out-of-state lawyers are not themselves personally affected by the operation of state laws, do not participate in state or municipal government through voting or paying taxes, are not members of local bar associations, and do not, as a general rule, make frequent appearances in local courts. As a result, when compared to resident lawyers, out-of-state attorneys are less familiar with local attitudes about law and society, less affected by the overall functioning of the state court system outside the context of occasional cases which they handle in local courts, less restrained by considerations of reputation in the legal community, and less aware of local standards of ethics as practiced by Iowa lawyers and articulated through opinions of the state courts and appropriate bar committees.

The lack of residential nexus is directly related to the comparative inability of out-of-state attorneys to comply with the spirit of various provisions of the Iowa law.

It is difficult for out-of-state lawyers not active in the local legal community to contribute to the peer-enforced disciplinary process embraced by Iowa Code of Professional Responsibility Canon 1 and DR 1-103, or to assist in preventing unauthorized practice of law as required by Canon 3 of the Code. App. A at 2. In addition, out-of-state lawyers will not generally be able to find time "to participate in serving the disadvantaged," at least within Iowa, as provided by Iowa Code of Professional Responsibility Canon 2 and EC 2-27. App. A at 1-2. *See also In Re Legal Services to the Poor in Civil Cases*, Misc. Rec. (Iowa S.Ct., Nov. 25, 1981) (urging Iowa State Bar Association to provide leadership in studying and providing services to the poor). *See* App. B at 6-7.

Similarly, even if they were admitted, nonresident lawyers could not exercise informed judgment in electing judicial nominating commissioners who screen candidates for appointment to judicial posts. Iowa Code § 46.7. And, it is unlikely that our out-of-state lawyers can meet the general expectation in Iowa that lawyers participate in proposing and supporting legislation and programs designed to improve the state legal system and work to obtain changes in laws to simplify the system and avoid unjust results. Iowa Code of Professional Responsibility Canon 9 and EC 9-1, 9-2. App. A at 3-4.

Because nonresidents traditionally have not been admitted to the Iowa bar, no body of direct empirical data exists to support or challenge Iowa's view that nonresident applicants have less identification with the state legal system than do residents who apply. However, Iowa does allow residents admitted to the bar to retain their membership if they later move to another state. Data is

available comparing the compliance of resident lawyers and former resident lawyers with continuing legal education and client security fund requirements that have been established by Iowa law.

As could be predicted, the statistics clearly show that out-of-state lawyers are less committed to compliance with the requirements necessary to continue the practice of law in Iowa than are residents. Between 1976 and 1982, 32 resident lawyers were suspended for noncompliance with continuing legal education requirements, Iowa Court Rule 123, while 66 lawyers who were residents at the time of their admission but who have since moved out of state were suspended. Similarly, while 31 resident lawyers were suspended during the period from 1974 to 1982 for failure to pay client security fund fees, Iowa Court Rule 121, 61 lawyers who were formerly residents were suspended.[1]

This data and critical commentary is not meant to imply that lawyers who reside in sister states are less competent, less able, or less professional than their Iowa counterparts. Indeed, the observations are sociological rather than moral in character. Iowa does assert, however, that because nonresident lawyers are substantially less interested in important aspects of local practice, the

---

[1]A review of public records on file with the Iowa Supreme Court conducted on June 12, 1984, reveals that of 6,312 attorneys currently practicing in Iowa, 951 did not maintain a current residence. Because former Iowa residents comprise only a small fraction of the bar, the noncompliance figures would be even more striking if expressed in percentage rather than absolute terms. The suspension data is compiled from official orders of the Iowa Supreme Court, which may be judicially noticed in this forum. *See, i.e., In Re Matter of the Enforcement of* Supreme Court Rule 121.6, Misc. Order (Iowa S.Ct. July 15, 1983).

state has a strong interest in limiting and controlling their ability to practice law within the local jurisdiction through a residency requirement.[2]

Second, Iowa believes that resident lawyers are more likely to know and comply with local rules and customs as required by Iowa Code of Professional Responsibility Canon 7 and DR 7-106(C) (5) and (6). App. A at 2. In isolation, it may seem that the late filing of various motions, submission of an unauthorized or over long brief, or failure to observe local courtesies is a minor matter. But when considered cumulatively, failure to comply with local rules and customs can significantly disrupt local court systems by causing unnecessary friction and controversy among the parties by burdening the already strained court system with various motions to enforce the

---

[2]Iowa's policy of allowing resident lawyers to maintain bar membership after moving outside the state is not inconsistent with its refusal to allow the admission of nonresident attorneys. Once a lawyer actually resides and practices in Iowa, he or she develops community ties that survive a change of residence. While identification with the local legal system by formerly resident lawyers is likely to be less intense than the identification of currently resident lawyers, it should plainly exceed that of lawyers who have never established a residential connection with Iowa. Having determined that residency should be a factor in bar admissions, Iowa is entitled to broad leeway in determining precisely where to draw the policy line on the residency continuum.

In addition to allowing former resident attorneys to maintain bar membership after moving out of state, Iowa also has relaxed its generally applicable residency requirement for lawyers who establish an office in Iowa for the practice of law. *See* Iowa Court Rule 105. App. A at 4. Iowa thus has concluded that establishment of a local law office is sufficient to overcome the presumption of lack of community nexus that generally results from nonresidency.

rules.[3] Lawyers who reside within the state and are thus part of the local professional community are far more likely to be familiar with state court procedures than attorneys who in the far distant offices often do not even have access to printed copies of local rules and who do not interact on a regular basis with members of the local bench and bar.

Third, Iowa believes that its residency requirement enhances its practical ability to regulate the profession. Iowa, for instance, has adopted stringent rules for the handling of client funds deposited in lawyers' trust accounts. *See* Iowa Court Rule 121. Among other things, the rule authorizes disciplinary staff to conduct audits of a lawyer's trust account. *Id.* at 121.4. Enforcing the rule through auditing of trust accounts outside the state would be a substantial administrative burden and, given lack of resources, could lead to an undesired reevaluation of policy. And, if Iowa's residency requirement is invalid, out-of-state enforcement difficulties could be an additional factor as Iowa considers the merits of an "Interest on Legal Trust Accounts," or IOLTA program[4] as espoused by at least some members of the Iowa bar.

---

[3]Even compliance with seemingly insignificant rules mandating size of paper used for legal pleadings enhances the efficiency of the court system. *See* "Chipping Away at Mountains of Paperwork," A.B.A.J. 834-35 (1981).

[4]IOLTA programs generally establish a framework for dedicating interest on legal trust accounts to aid for the poor, provide student loans, and assist in the administration of justice. In 1982, the Iowa Legislature directed the Office of the Governor, inter alia, to study alternative sources of funds for legal services to low income persons." *See* 1982 Iowa *Acts*, Ch. 1260, Sec. 85(1) (c). The subsequent report of the Governor expressly considered IOLTA proposals. *See Legal Services to*

(Continued on following page)

Fourth, a wide open admissions policy would encourage a flood of applications from persons who are not seriously interested in the practice of law in Iowa. An unlimited admissions policy would encourage recent law school graduates to sit for the Iowa bar as a "practice" exam or as a form of professional "insurance" should they fail to pass in their state where they intend to reside. Attorneys for business concerns with one warehouse or outlet in the state would be elegible for bar admission even though their interest in state legal affairs is marginal at best. A state should have the power to avoid resource expenditures associated with the admission process where applications are predicated on only incidental interest in local practice.

Any swelling in the ranks of what would become an amorphous national bar licensed to practice locally in Iowa would make it more difficult intensively to regulate the profession because of the additional resources required for background checks, examination graders, staff to monitor continuing legal education and client security programs. The growth would also tend to limit the ability of the state to initiate new, innovative regulatory programs designed to promote public trust as well as improve the quality of the bar, at least where the programs are resource intensive.

(Continued from previous page)

the Poor in Iowa, Office of the Governor (Iowa, Jan. 1983) at 15-18. The Board of Governors of the Iowa State Bar Association has appointed a committee to study the IOLTA issue. *See The News Bulletin of the Iowa State Bar Assoc.*, Vol. 42:12 (Dec. 1982) at 5-6. The Iowa Supreme Court has not yet taken action on this issue.

At a minimum, the above state interests are entitled to great weight in the context of a privilege and immunities challenge to a bar residency requirement. Regardless of the continuing vitality of the 19th century cases that immunize bar residency requirements from privileges and immunities attack, *Bradwell v. State*, 16 Wall. 130, 83 U.S. 130 (1872), *In re Lockwood*, 154 U.S. 116 (1893), this Court has consistently and recently noted that a state's interest in regulating lawyers is "especially great since lawyers are essential to the primary governmental function of administering justice." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975), *Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977). Thus, even assuming *Bradwell* and *In re Lockwood* no longer represent black letter law, the challengers to state residency requirements for bar admission still face an uphill battle in overcoming powerful modern state interests recognized by this Court.

Iowa believes no sufficiently weighty counterveiling interest on behalf of out-of-state lawyers can be found to defeat a state residency requirement for bar admission. An attorney wishing to practice law within the state is free to comply with appropriate residency requirements and begin to practice full throttle within the jurisdiction. In the alternative, the out-of-state practitioner may associate a resident attorney either on a case-by-case or more permanent basis to insure that clients are appropriately represented in the foreign state. *See* Iowa Code § 610.13, Iowa Court Rule 116. App. A at 4. An out-of-state lawyer is thus not denied access to the courts of sister state, nor deprived of an opportunity to earn a livelihood, by operation of residency requirements for state bar admission.

CONCLUSION

For the above stated reasons, the opinion and decision of the United States Court of Appeals for the First Circuit in the above captioned matter should be reversed.

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APPENDIX A

Iowa Code of Professional Responsibility

Canon 1

A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession.

DR 1-103: Disclosure of Information to Authorities

(A) A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

(C) A lawyer possessing unprivileged knowledge or evidence that another lawyer or judge is suffering from such mental or emotional instability as renders him unfit or unable to furnish competent legal services shall report such knowledge to a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

Canon 2

A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available

EC 2-27: Financial Ability to Employ Counsel; Persons Unable to Pay

Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for

providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

Canon 3

A Lawyer Should Assist in Preventing the Unauthorized Practice of Law

Canon 7

A Lawyer Should Represent a Client Zealously Within the Bounds of the Law

DR 7-106(C): Trial Conduct

• • •

(5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(7) Intentionally or habitually violate any established rule of procedure or of evidence.

Canon 8

A Lawyer Should Assist in Improving the Legal System

EC 8-1

Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system. This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances. By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus they should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients.

EC 8-2

Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate changes in the law. He should encourage the simplification of laws and the repeal or amendment of laws that are outmoded. Likewise, legal procedures should be improved whenever experience indicates a change is needed.

EC 8-7

Since lawyers are a vital part of the legal system, they should be persons of integrity, of professional skill, and of dedication to the improvement of the system. Thus a lawyer should aid in establishing, as well as enforcing,

standards of conduct adequate to protect the public by insuring that those who practice law are qualified to do so.

Iowa Rules of Court

Iowa Court Rule 105

• • •

In order to be admitted to the bar in the state of Iowa, the applicant shall be an inhabitant of the state of Iowa, or demonstrate a bona fide intention to become an inhabitant of Iowa immediately upon admission to the bar, or demonstrate a bona fide intention to establish an office for the practice of law in Iowa.

• • •

Iowa Court Rule 116

Attorneys not admitted in Iowa—appointment of local attorney—contested cases before administrative agency. Any attorney admitted to practice in any state and not admitted in Iowa, may commence an action in an Iowa court and may, further, in the discretion of the court in which the action is pending, be permitted to conduct such cause or other matter pending, including the defense of a cause without being admitted to practice in Iowa providing that he promptly files with the clerk of such court the written appearance of a resident attorney admitted to practice in this state upon whom service may be had in all matters connected with said cause or matter with the same effect as if personally made upon the attorney not admitted to practice in Iowa. In case of failure to file and maintain such appearance, the court before which the matter is pending shall notify the attorney not admitted to practice in Iowa and the parties he represents to comply with section 610.13, The Code, within twenty days of the date of the notice. In event of failure to comply within

such period, the court, on its motion or on motion of the adverse party or parties, may dismiss the action, or strike the pleadings of the noncomplying party from the files, and enter thereafter such judgment as is then appropriate.

Any attorney admitted to practice in any state and not admitted in Iowa may represent others in a contested case before an administrative agency of this state, at the discretion of such agency, providing that such attorney promptly files with the agency the written appearance of a resident attorney admitted to practice in Iowa upon whom service may be had in all matters connected with said case with the same effect as if personally made on the attorney not admitted to practice in Iowa. The terms "agency" and "contested case" as used in this rule are defined in section 17A.2, The Code.

APPENDIX B

IN THE SUPREME COURT OF IOWA

In re Legal Services to the Poor in Civil Cases.

RESOLUTION

(Filed November 25, 1981)

WHEREAS the legal profession has a unique and historic responsibility to provide legal services to the poor, reflected in EC-27 of the Iowa Code of Professional Responsibility, and

WHEREAS this court has the responsibility to supervise the members of the profession who are admitted to practice in Iowa and are thus officers of the Iowa courts, and

WHEREAS federal legislative action appears likely to reduce the capacity of Legal Services Corporation of Iowa to provide legal services to indigent Iowans in civil cases, and

WHEREAS the Iowa State Bar Association has a proud tradition of leadership in establishing programs and initiating action to assist the profession and this court in solving problems which affect Iowa lawyers and citizens,

BE IT RESOLVED that this court now respectfully invites the Iowa State Bar Association to accept a leadership role in studying the problem of providing legal services to the poor in Iowa in civil cases and determining how the Iowa legal profession and courts can best meet their responsibility to work toward a solution of the problem. This court offers its cooperation and support and will give

prompt and serious consideration to any recommendation of the bar which may require court action.

Dated this 25th day of November, 1981.

By the Court

/s/ W. W. Reynoldson, Chief Justice

cc: Iowa State Bar Association
Members of the Court
Legal Services Corporation of Iowa

AMICUS CURIAE

BRIEF

Office-Supreme Court, U.S.
FILED
JUN 18 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1466

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SUPREME COURT OF NEW HAMPSHIRE,
Appellant,

vs.

KATHRYN A. PIPER,
Appellee.

On Appeal from the United States Court of Appeals
for the First Circuit

BRIEF OF THE STATE OF TENNESSEE AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

	Page
Interest of Amicus Curiae	1
Summary of Argument	2
Residency Requirements Such as that of Tennessee are Supported by Substantial State Interests	3
Conclusion	7

TABLE OF AUTHORITIES

Bar Association of Tennessee v. Union Planters Title Co., 46 Tenn. App. 100, 326 S.W.2d 767 (1959)	5
Haverty Furniture Co. v. Foust, 174 Tenn. 203, 124 S.W.2d 694 (1939)	5
People ex rel. Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928)	5
Theard v. United States, 354 U.S. 278 (1957)	5
Tennessee Supreme Court Rule 7:	
Section 1.03	3
Section 8.01	3
Section 8.03	1,4
Section 10.01	4

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BRIEF OF THE STATE OF TENNESSEE AS AMICUS CURIAE IN SUPPORT OF APPELLANT

INTEREST OF AMICUS CURIAE

The State of Tennessee provides for licensing and regulation of attorneys, pursuant to the police power of the state, through Tennessee Supreme Court Rule 7, which took effect as amended on March 1, 1984. The administration of the licensing procedure is delegated to the Board of Law Examiners. Article VIII of Rule 7 contains the requirement that an applicant for admission to the bar in Tennessee have established his domicile therein. Article VIII, Section 8.03 contains certain exceptions to this requirement, which are set out in the Argument *infra*.

In this case, the Court is asked to decide whether the states will continue to be accorded their traditionally broad discretion in regulating the practice of law within their boundaries, in accordance with the principles of federalism. The decision in this case will have a significant impact on the ability of the State of Tennessee, through its Supreme Court, to determine the future course of attorney licensing and regulation. The State of Tennessee is filing this brief for the primary purpose of pointing out the greater flexibility of Tennessee's residency requirement as opposed to that of New Hampshire. The State of Tennessee as amicus curiae urges reversal of the opinion of the court below.

SUMMARY OF ARGUMENT

The broad deference traditionally accorded the states in the regulation of the practice of law should not be abandoned. The practice of law in Tennessee is regulated for the public good. Rule 7 of the Rules of the Tennessee Supreme Court establishes a residency requirement for admission to the Tennessee Bar. The State will admit a non-resident if that person resides in a closely contiguous area that is customarily identified residentially with the State of Tennessee. Tennessee's rule seeks to strike a balance between the extreme positions of no admittance of non-residents and the complete admittance of non-residents. The rule is justified by the peculiar public service nature of the legal profession and by the recognition that a non-resident who does not fit within the exception of Rule 7 would not have the incentive to fulfill his responsibilities to Tennessee's legal system.

ARGUMENT

Residency Requirements Such As That Of Tennessee Are Supported By Substantial State Interests

Tennessee's Supreme Court rules concerning admission to the Bar of Tennessee have recently been revised, effective March 1, 1984. Rule 7 governs the licensing of attorneys. Article I, Section 1.03 establishes the criteria for admission:

> The certificate of the Board will be based upon a determination that the applicant: (i) is of the statutory age; (ii) has satisfied the educational requirement for admission specified by this rule; (iii) has passed the examination required by this rule, or is eligible for admission without examination; (iv) has demonstrated such reputation and character as in the opinion of the Board indicates no reasonable basis for substantial doubts that the applicant will adhere to the standards of conduct required of attorneys in this state; and (v) has evidenced a commitment to serve the administration of justice in this state.

Article VIII, Section 8.01 of Supreme Court Rule 7 elaborates on the commitment to serve the administration of justice in Tennessee, establishing simple indicia for demonstrating this commitment:

> The requisite commitment to serve the administration of justice in Tennessee subject to the duties and standards imposed on attorneys in this state shall be evidenced by:
>
> (a) A statement by the applicant before examination or before admission without examination that he or she intends to engage in the practice of law in Tennessee, and agrees to abide by the duties and standards imposed from time to time on attorneys in this state; and
>
> (b) Proof satisfactory to the Board that the applicant, before admission, has established his or her domicile in Tennessee.

The requirement of domicile in Tennessee is not, however, without some degree of flexibility. Article VIII, Section 8.03 of Rule 7 of the Tennessee Supreme Court provides:

> In interpreting the residence and domicile requirements here imposed, the Board may excuse temporary absences which are not inconsistent with the basic purpose of the requirement to demonstrate a physical presence in Tennessee. A person may, in the discretion of the Board, be considered as having qualified under these domicile and residence requirements if such domicile and residence are established in an area closely contiguous to the boundaries of the State of Tennessee and in an area which is customarily regarded as a residential adjunct or suburb to the State of Tennessee.

Thus, the State of Tennessee will admit a non-resident to the Bar if that person resides in a closely contiguous area that is customarily identified residentially with the State of Tennessee. Furthermore, the State of Tennessee permits non-resident attorneys to appear *pro hac vice* in Tennessee state courts under Article X, Section 10.01 of Supreme Court Rule 7.[1]

The practice of law is not a single and indivisible concept but rather is capable of various definitions. The individual states have traditionally been accorded broad discretion to define and regulate the practice of law within their respective jurisdictions.

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[1] Section 10.01 states:

> Non-resident attorneys associated with attorneys in this State in any case pending here who do not desire to practice regularly in this State will be allowed as a matter of courtesy to appear in such case in which they may be thus employed without procuring a license, when introduced to the Court by a member in good standing of the Tennessee Bar. Such a non-resident attorney must be admitted to practice and be in good standing in the jurisdiction of his residence.

The State of Tennessee submits that the traditional broad deference in this area to the principles of federalism should not be abandoned by this Court.

The fundamental purpose underlying the rules regulating the practice of law in Tennessee is to insure to the public the highest quality of service possible. *Haverty Furniture Co. v. Foust*, 174 Tenn. 203, 210, 124 S.W.2d 694 (1939). The protection of members of the bar from competition is not the purpose behind the rules. *Bar Association of Tennessee v. Union Planters Title Co.*, 46 Tenn.App. 100, 124-27, 326 S.W.2d 767 (1959). The State of Tennessee has a substantial interest on behalf of the public in insuring that those persons who are granted licenses to practice law in Tennessee are qualified individuals who will contribute to the communities from which their livelihood is derived.

Attorneys are more than practitioners of a learned profession. They occupy a special niche in our society. Attorneys advise others as to their legal duties, rights and remedies. They enter into a relationship of confidence and trust with each client. The fact that a large number of our national, state and local officials are attorneys shows the special affinity for public service held by the legal profession and the expectation of such service by the public. Furthermore, the unique relationship of attorneys with the judicial branch of state government demonstrates the public service qualities of the legal profession. Upon admission to the Bar, an attorney becomes "an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 470-71, 162 N.E. 487, 489 (1928), *quoted in Theard v. United States*, 354 U.S. 278, 281 (1957). Residency requirements for admission to the Bar serve to limit the practice of law and the accompanying obligations to the public to those persons who have a stake in the results, the residents of the state. Residency is a fair, just and rational condition upon the practice of law which guarantees appropriate participation in

the system as well as in public service activities, for a resident must actually live with the results of his actions.

The Tennessee Supreme Court has recognized the special connection of attorneys with public service. Rule 8 embodies Tennessee's version of the Code of Professional Responsibility. While the notion of public service permeates the entire code, two provisions are especially important. Canon 1 states "A lawyer should assist in maintaining the integrity and competence of the legal profession" while Canon 8 requires that "A lawyer should assist in improving the legal system." These canons are more than mere expressions of general ideals. They are duties to be taken seriously by members of the bar. It cannot be convincingly argued that a resident of another state in an area noncontiguous to Tennessee would have the ability or incentive to fulfill the requirements of these two canons in this state. Only a resident has a stake in the quality of the legal profession in Tennessee, in the degree of public service provided by this profession, and in the legal system of the state.

Tennessee's residency requirement embodies an attempt to balance the interests of the residents of Tennessee with the interests of non-residents. The Rule recognizes the important obligations and contributions of attorneys to our society. It takes the position that those persons licensed to practice in Tennessee have certain duties owed to the citizens of Tennessee. Yet, the Rule also recognizes that certain non-residents can make these contributions as well as residents. Therefore, attorneys living in closely contiguous areas customarily identified residentially with the State of Tennessee may be admitted to the Tennessee Bar.

CONCLUSION

For the reasons stated, the State of Tennessee urges this Court to uphold the residency requirement of the Supreme Court of New Hampshire and to reverse the decision of the Court below.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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TABLE OF CONTENTS

	Page
Table of Authorities	i
Interest of Amici Curiae	1
Summary of Argument	2
Argument	3
The Privileges And Immunities Clause Of Article IV Does Not Apply To Residency Requirements Imposed By States As A Condition To Being Licensed To Practice Law Within Their Boundaries	3
Conclusion	12

TABLE OF AUTHORITIES

Cases

Baldwin v. *Montana Fish and Game Commission*, 436 U.S. 371 (1978) 8

Bradwell v. *Illinois*, 83 U.S. (16 Wall.) 130 (1873) 7, 8

Campbell v. *Morris*, 3 Har. & M. Henry, 535 (1797) 6

Canfield v. *Wisconsin Board of Attorneys Professional Competence*, 490 F.Supp. 1286 (W.D. Wis. 1980) 7

Chalker v. *Birmingham & N.W.R. Co.*, 249 U.S. 522 (1919) .. 8

Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975) 3

Gordon v. *Committee on Character and Fitness*, 48 N.Y.2d 266, 397 N.E.2d 1309 (1979) 10

Hicklin v. *Orbeck*, 437 U.S. 518 (1978) 7, 8, 9, 11

Hoover v. *Ronwin*, ____U.S.____, 52 U.S.L.W. 4535 (U.S. May 14, 1984) 4

Page

In Re Belva Lockwood, 154 U.S. 116 (1984) 6, 11

LaTourette v. *McMaster*, 248 U.S. 465 (1919) 8

Law Students Research Council v. *Wadmond*, 401 U.S. 154 (1971) 10

Leis v. *Flynt*, 439 U.S. 438 (1979) 4, 9

Sargus v. *West Virginia Bd. of Law Examiners*, ____W.Va. ____, 294 S.E.2d 440 (1982) 10, 11

Toomer v. *Witsell*, 334 U.S. 385 (1948) 7

United Building and Construction Trades Council of Camden County and Vicinity v. *Mayor and Council of the City of Camden*, ____U.S.____, 52 U.S.L.W. 4187 (U.S. Feb. 21, 1984) 11

United States v. *Villamonte-Marquez*, ____U.S.____, 51 U.S.L.W. 4812 (U.S. June 17, 1983) 5

Ward v. *Maryland*, 79 U.S. (12 Wall.) 418 (1871) 7, 8

Wilson v. *Wilson*, 416 F.Supp. 984 (D. Or. 1976), *aff'd mem.*, 430 U.S. 925 (1977) 6

Statutes

Statutes at Large of Virginia, 12 Hen., Chapter 56 (1786) ... 4

Virginia Code:

§ 3191 (1887) 4

Legislative Materials

Ch. 41, Acts of Assembly of 1896 4

Records of the Federal Convention (1911) 5

Page

Other Authorities

A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV, 92 *Harv. L. Rev.* 1461 (1979) 5

Privileges and Immunities of Citizens In the Several States, 1 *Mich. L. Rev.* 286, *cont.* 1 *Mich. L. Rev.* 364 (1903) ... 6

Wellman, Admission to the Bar, 15 *Am. L. Rev.* 295 (1881) .. 5

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INTEREST OF AMICI CURIAE

States provide for licensing and regulation of attorneys either through statutes adopted by State legislatures or through rules adopted by the State's highest court. In both instances, the administration of the licensing procedure is usually delegated to an administrative body. The amici represent States which include, or are presently considering,

some type of residency requirement in the overall program for regulating the practice of law within their jurisdiction.[1]

In this case, the Court will decide whether the longstanding principles of federalism, as applied to the interest and ability of a State to regulate the practice of law, will be preserved. As of January 1983, approximately 41 States incorporated residency requirements in some form as part of their program for licensing an attorney. Therefore, the decision in this case will have a significant impact on the ability of the States, through the legislative or judicial branch of government, to determine the future course of attorney licensing and regulation.

The Supreme Courts of Nevada and Texas, the Board of Bar Examiners of New Mexico, and the Board of Law Examiners of North Carolina file this brief with the consent of all parties.[2] All amici joining this brief urge reversal of the judgment of the court below.

SUMMARY OF ARGUMENT

This Court has recognized that States have a significant interest in the regulation of lawyers and the legal profession. The unique relationship of attorneys to the effective functioning of the judicial branch of government has caused this Court to repeatedly acknowledge the need for, and propriety of, State control of the licensing of attorneys who serve as officers of the court. A requirement of residency in some form has historically been an integral part of a licensing procedure even predating the Constitution. The Founding Fathers, in enacting the Privileges and Immunities Clause of the Constitution in 1789, did not envision repeal

[1] A petition to revive regulations involving residency has been approved by the Wisconsin State Bar Board of Governors.

[2] Counsel for appellant and appellee have expressed consent by letters filed with the Clerk of the Court.

of the residency requirements at issue here. These requirements do not hinder the development of the single Nation the goal of the Privileges and Immunities Clause and the Constitution itself. Thus, the court below erroneously applied the Privileges and Immunities Clause to this case and should be reversed.

ARGUMENT

The Privileges And Immunities Clause Of Article IV Does Not Apply To Residency Requirements Imposed By States As A Condition To Obtaining A License To Practice Law Within Their Boundaries.

While some have minimized the significance of the practice of law as a profession and its regulation, the Supreme Court of the United States assuredly has not. Indeed, this Court has recognized that

> the States have a *compelling interest* in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. . . . *The interest of the States in regulating lawyers is especially great* since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' (Emphasis added.)

Goldfarb v. *Virginia State Bar*, 421 U.S. 773, 792-93 (1975). It follows that,

> since the founding of the Republic, the *licensing and regulation of lawyers has been left exclusively to the States* and the District of Columbia within their re-

spective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. (Emphasis added.)

Leis v. *Flynt*, 439 U.S. 438, 442 (1979).

Most recently, this Court stated, "[t]he regulation of bar activities is at the core of the State's power to protect the public. . . . Nor is any trade or other profession as 'essential to the primary governmental function of administering justice.' " *Hoover* v. *Ronwin*, ____ U.S. ____, 52 U.S.L.W. 4535, 4538 (U.S. May 14, 1984) (citations omitted).

In regulating lawyers and the legal profession, many States have long required applicants for admission to the Bar to be residents, and many of these requirements predate the Constitution of the United States. In Virginia, such a provision has existed since at least 1786. At that time, the Virginia statute empowered the judges of the high court of chancery or general court to administer an examination and to issue a license if the applicant was duly qualified, provided the applicant "produce to them [the judges] a certificate from the court of that county wherein his usual abode shall have been during twelve months next preceding, that he is a person of honest demeanor." Statutes at Large of Virginia, 12 Hen., Chapter 56 (1786).

The history of this practice of requiring residency as a qualification for admission to the Bar continued through the nineteenth century and to the present time.[5] Indeed, in 1881 it was reported that "all the States agree, and certainly they are rational requirements, that to entitle an applicant to an examination as an attorney, he must prove

[5] For a brief period of nine years, between 1887 and 1896, it appears that Virginia did not impose a residency requirement. *See* Va. Code § 3191 (1887), which eliminated such a requirement, and Ch. 41, Acts of Assembly of 1896, which restored the residency requirement.

that he is a . . . resident of the county or district within which the application is made. . . ." Wellman, Admission to the Bar, 15 *Am. L. Rev.* 295, 304 (1881). A century later, in 1979, forty-five states maintained residency requirements for persons seeking admission to the Bar. Note, A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV, 92 *Harv. L. Rev.* 1461 (1979).

Significantly, there is no suggestion in the voluminous records and correspondence pertaining to the Constitutional Convention of 1787 compiled by Professor Farrand, *Records of the Federal Convention* (1911), that the Privileges and Immunities Clause was intended to prohibit either State regulation of professions or State requirements of residency, or, indeed, to impact upon them in any way. The total absence of any contemporaneous comment or objection to the maintenance of residency requirements at the 1787 Convention is highly significant.[6]

The first case to interpret the Privileges and Immunities Clause of Article IV was argued by the noted federalist Luther Martin, who served as the Attorney General of Maryland and was a member of the Constitutional Con-

[6] In *United States* v. *Villamonte-Marquez*, ____ U.S. ____, 51 U.S.L.W. 4812 (U.S. June 17, 1983), the Court construed a statute authorizing search of naval vessels. The statute's lineal ancestor had been enacted by Congress in 1790. Recognizing that the statute had "an impressive historical pedigree," the Court concluded that the members of the same Congress which proposed adoption of the Bill of Rights must not have believed the type of search authorized by the statute to be "unreasonable," and the Court proceeded to hold that the statute did not violate the Fourth Amendment.

Similarly, failure of any members of the 1787 Convention to suggest that the Privileges and Immunities Clause would prohibit or limit individual State residency requirements as part of a State's regulation of professions must be indicative of the Founding Fathers' belief that such regulations did not conflict with the new Constitution.

vention of 1787. Mr. Martin contended that the privileges and immunities protected under Article IV included (1) holding property, (2) protection of the law in the same manner as the citizens of the State, (3) access to the courts, and (4) ingress to a State without taking an oath of allegiance. *Campbell* v. *Morris*, 3 Har. & M. Henry 535, 548 (1797). In that case, Martin argued that the Privileges and Immunities Clause did not prevent Maryland from adopting a statute permitting attachment of property of an out-of-State resident under circumstances which would not permit attachment of a resident's property. The Maryland court rejected the nonresident's argument that the statute was unconstitutional and, as argued by the Attorney General, sustained the validity of the statute.* The significance of this early case is that it dispels any notion that the Founding Fathers intended the Clause to apply to State regulation of the legal profession at issue here.

While the Supreme Court has not had many occasions to develop the contours of the Privileges and Immunities Clause, its decisions dispel any notion that the Clause prohibits state residency requirements as a condition to attorney licensure. In the case of *In Re Belva Lockwood*, 154 U.S. 116 (1894), Mrs. Lockwood sought a writ of mandamus directing the Supreme Court of Virginia to admit her to practice law in that Court. Among other claims, she noted

* An excellent Note, *Privileges and Immunities of Citizens in the Several States*, 1 *Mich. L. Rev.* 286, and continued at 1 *Mich. L. Rev.* 364 (1903), summarizes the types of activities subject to protection under Article IV, and finds that qualification for the practice of law for which the State requires special fitness is not so protected. That Note states that the Clause does, however, protect (1) the right of free ingress and egress across States, (2) the right to import and export property, (3) the right to acquire, hold and enjoy property, (4) the right to contract, and (5) the right to substantial protection of all substantive rights at no greater expense than its own citizens are subject to.

that she was a member of the Bar of the District of Columbia courts, and she argued that the Virginia court's action denied her a privilege or immunity in violation of the Privileges and Immunities Clause of Article IV and of the Fourteenth Amendment. Relying upon *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130 (1873), the Supreme Court rejected her arguments, holding that the right to practice law in the State courts was not a privilege or immunity of a citizen of the United States, and that the right to control and regulate the granting of a license to practice law in the courts of a State is a matter of local control.

Bradwell and *Lockwood* remain good law today.* The more recent decisions of *Toomer* v. *Witsell*, 334 U.S. 385 (1948), and *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978), do not overrule the earlier cases; nor do they counsel a different result. The more recent cases only concern discrimination against "nonresidents seeking to ply their trade, practice their occupation or pursue a common calling." *Hicklin*, 437 U.S. at 524. In *Toomer* and *Hicklin*, the Court, relying upon precedent in the context of common callings, invalidated discriminatory taxing and regulatory statutes where there was no substantial reason for the discrimination. The precedent relied upon makes it clear, however, that the Court has distinguished between statutes imposing discriminatory taxing burdens or prohibitions on those seeking to pursue common callings, and those statutes adopted under the police power to regulate the professions.

Hicklin relies upon *Ward* v. *Maryland*, 79 U.S. (12

* This Court summarily affirmed the constitutionality of Oregon's residency requirement in *Wilson* v. *Wilson*, 416 F.Supp. 984 (D. Or. 1976), *aff'd mem.*, 430 U.S. 925 (1977). Plaintiff in *Wilson* claimed a violation of the Privileges and Immunities Clause in the district court and Supreme Court. *See Canfield* v. *Wisconsin Board of Attorneys Professional Competence*, 490 F.Supp. 1286 (W.D. Wis. 1980).

Wall.) 418 (1871), which held unconstitutional a statute requiring out-of-State merchants to obtain a license and pay a high fee before selling their wares in Baltimore. Yet, two years after *Ward*, the Court decided the *Bradwell* case, and rejected an argument that the right to practice law in another State by a nonresident was protected under the Privileges and Immunities Clause. Similarly, in *Chalker* v. *Birmingham & N.W.R. Co.*, 249 U.S. 522 (1919), the Court invalidated a Tennessee statute which imposed a discriminatory taxing scheme upon an out-of-State contractor, but only several months earlier, in *LaTourette* v. *McMaster*, 248 U.S. 465 (1919), the Court had sustained the South Carolina regulatory scheme requiring insurance brokers to be residents.

Thus, it is apparent that the Supreme Court has recognized a distinction between the type of taxing and licensing matters which are subject to scrutiny under the Privileges and Immunities Clause and those professional regulations which are not. It is impermissible under the Privileges and Immunities provision to burden, without justification, common callings such as merchandising, fishing and construction, but as this Court has held, statutes similar to that at issue here are not subject to such a limitation.

Baldwin v. *Montana Fish and Game Commission*, 436 U.S. 371 (1978), decided the same term as *Hicklin*, confirms that this Court continues to recognize distinctions based upon residency. There, the Court, in commenting on the applicability of the Privileges and Immunities Clause, observed:

> It has not been suggested, however, that state citizenship or residency may never be used by a State to distinguish among persons.
>
> • • •

> Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally.

436 U.S. at 383. It can be hardly said that a Bar residency requirement which has existed in certain States since the time of the Revolution now suddenly hinders the purpose or the development of a single Union.

The conclusion that a Bar residency requirement does not violate the Constitution is verified by *Leis* v. *Flynt*, 439 U.S. 438 (1979), decided after *Hicklin*. That case involved a request by nonresident attorneys to appear *pro hac vice* in Ohio State courts. This Court, after observing that the licensing of lawyers has been left exclusively to the States, held:

> There is no right of federal origin that permits such lawyers to appear in state courts without meeting that State's bar admission requirements. This Court, on several occasions, has sustained state bar rules that excluded out-of-state counsel from practice altogether or on a case-by-case basis.

439 U.S. at 443. *Leis* held that Ohio had the right to exclude nonresident attorneys from practice in that State, even on individual cases. Although *Leis* does not cite the then recent *Hicklin* case, the *Leis* opinion does acknowledge the Privileges and Immunities Clause in footnote 3, 439 U.S. at 442. Significantly, that footnote immediately follows the passage in which this Court declares that States have the exclusive

authority to prescribe qualifications for admission to practice. 439 U.S. at 442. Thus, after *Hicklin*, and after referring to the Privileges and Immunities Clause, the Supreme Court has permitted State A to exclude an attorney residing in State B from practice in State A simply because that attorney was not a resident admitted to practice in State A. *See* Justice Stevens' dissenting opinion, 439 U.S. at 448-449. This post-*Hicklin* decision removes any doubt that Bar residency requirements are constitutional.

Law Students Research Council v. *Wadmond*, 401 U.S. 154 (1971), also provides support for the proposition that residency requirements are constitutional. There, the Plaintiffs attacked the New York regulatory approach for licensing lawyers, an approach which included a residency requirement. The principal challenge was one of overbreadth under the First Amendment because of possible State inquiry into political beliefs, but the Court rejected the appellants' contentions. Justice Marshall, joined by Justice Brennan, dissented on the First Amendment issue, but first stated,

> As an abstract matter I do not take issue with the proposition that some inquiry into the qualifications of Bar applicants may be made, beyond such obvious threshold qualifications as residence or success in a regularly administered written examination. (Emphasis added.)

401 U.S. at 186.

In recent years several state supreme courts have declared residency requirements to be violative of the Privileges and Immunities Clause. *See, e.g., Sargus* v. *West Virginia Bd. of Law Examiners*, ____W.Va.____, 294 S.E.2d 440 (1982); *Gordon* v. *Committee on Character and Fitness*, 48 N.Y.2d 266, 397 N.E.2d 1309 (1979). These decisions, however, wrench the Privileges and Immunities Clause from its historic moorings and accord *Hicklin* a much more expansive meaning than is warranted.

The notion expressed in those opinions that *Baldwin* and *Hicklin* "revitalized" the Privileges and Immunities Clause, *see Sargus*, 294 S.E.2d at 443, underscores the error of those decisions because that Clause has never, even in its earliest time, been construed to strike down residency requirements similar to that presently pending before this Court. As stated in *Leis*, this is a matter which has been left exclusively to the States since the founding of the Republic, 439 U.S. at 438, and it is abundantly clear that the Supreme Court has not overruled its earlier cases upholding Bar residency requirements.

As most recently expressed by this Court, the first consideration which must be made is whether a residency requirement for the licensing of attorneys burdens a privilege or immunity protected by Art. IV, § 2. The privilege asserted must be " 'fundamental' to the promotion of interstate harmony." *United Building and Construction Trades Council of Camden County and Vicinity* v. *Mayor and Council of the City of Camden*, ____U.S.____, 52 U.S.L.W. 4187, 4190 (U.S. Feb. 21, 1984). This question was initially answered in 1894 in *In Re Belva Lockwood, supra*. The ability to practice law in the State courts is not a fundamental right protected by the Privileges and Immunities Clause. This principle has not adversely affected interstate harmony for the last 200 years. In fact, amici contend that the responsibility granted to, and undertaken by, the States to regulate the practice of law before their State courts has promoted interstate harmony in the practice of law and development of our legal system.

CONCLUSION

For the reasons stated, amici urge this Court to reverse the judgment of the court below.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 83-1466

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

SUPREME COURT OF NEW HAMPSHIRE,

Appellant,

v.

KATHRYN A. PIPER,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF PUBLIC CITIZEN, INC. AS *AMICUS CURIAE* URGING AFFIRMANCE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. RESIDENCE REQUIREMENTS CAN BE UPHELD ONLY IF SHOWN TO BE CLOSELY TAILORED TO ASSURE AN APPLICANT'S FITNESS OR CAPACITY TO PRACTICE LAW. 4

II. THE CHALLENGED RESIDENCE REQUIREMENT IMPERMISSIBLY IMPEDES THE INTERSTATE PRACTICE OF LAW, TO THE DETRIMENT OF CLIENTS WHO DESIRE TO FIND COMPETENT REPRESENTATION AT A PRICE THEY CAN AFFORD. 6

III. THE JUSTIFICATIONS OFFERED TO SUPPORT THE RESIDENCE REQUIREMENT ARE INSUFFICIENT UNDER BOTH THE PRIVILEDGES AND IMMUNITIES CLAUSE AND THE COMMERCE CLAUSE. 10

CONCLUSION 14

TABLE OF AUTHORITIES

Cases — **Page**

Bacchus Imports, Ltd. v. Dias,
___ U.S. ___ (June 29, 1984) 9

Baldwin v. Montana Fish and Game Comm'n,
436 U.S. 371 (1978) 5

Bates v. State Bar of Arizona,
433 U.S. 350 (1977) 2, 7

Bernal v. Fainter,
104 S. Ct. 2312 (1984) 11

Blum v. Bacon,
457 U.S. 132 (1982) 6

Boston Stock Exchange v. State Tax Comm'n,
429 U.S. 318 (1977) 8

City of Philadelphia v. New Jersey,
437 U.S. 617 (1978) 9

Dean Milk Co. v. City of Madison,
340 U.S. 349 (1951) 8

Giles v. Virginia Board of Bar Examiners,
Civ. No. 83-1282-A
(E.D. Va. February 8, 1984),
appeal pending, No. 84-1259 (4th Cir.) 2

Goldfarb v. Virginia State Bar,
421 U.S. 773 (1975) 2, 7

Gordon v. Committee on Character and Fitness,
48 N.Y.2d 266, 397 N.E.2d 1039,
422 N.Y.S.2d 641 (1979) 2

Great Atlantic & Pacific Tea Co. v. Cottrell,
424 U.S. 366 (1976) 8

Hicklin v. Orbeck,
437 U.S. 518 (1978) ..... *passim*

Hughes v. Oklahoma,
441 U.S. 322 (1979) 12

In re Griffiths,
413 U.S. 717 (1973) ..... *passim*

In re Judd,
391 Mass. 227, 461 N.E.2d 780 (1984) 2

Cases, contd.: — **Page**

In re R.M.J.,
455 U.S. 191 (1982) 5

In re Sackman,
90 N.J. 521,
448 A.2d 1014 (1982) 10

Kassel v. Consolidated Freightways Corp.,
450 U.S. 662 (1981) 8, 9-10

Law Students Research Council v. Wadmond,
401 U.S. 154 (1971) 4

Lewis v. BT Investment Managers, Inc.,
447 U.S. 27 (1980) 10

Mullaney v. Anderson,
342 U.S. 415 (1952) 5

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970) 8

Schware v. Board of Bar Examiners,
353 U.S. 232 (1957) 2, 4, 5

Sheley v. Alaska Bar Ass'n,
620 P.2d 640 (Alaska 1980) 9

South-Central Timber Development, Inc., v. Wunnicke,
104 S. Ct. 2237 (1984) 9

Toomer v. Witsell,
334 U.S. 385 (1948) 5, 8-9

Ward v. Maryland,
12 Wall. (79 U.S.) 418 (1871) 5

United States Constitution:

Article IV, Section 2, Clause 1
[Privileges and Immunities] ..... *passim*

Commerce Clause ..... *passim*

Due Process Clause 5

First Amendment 5

Court Rules: **Page**

New Hampshire Supreme Court Rule 42(7) 11

Other Authorities:

Horack, *"Trade Barriers" to Bar Admissions*, 28 J. Am. Judic. Soc. 102 (1944) 9

Smith, *Time for a National Practice of Law Act*, 64 A.B.A.J. 557 (1978) 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

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SUPREME COURT OF NEW HAMPSHIRE,

Appellant,

v.

KATHRYN A. PIPER,

Appellee.

BRIEF OF PUBLIC CITIZEN, INC. AS *AMICUS CURIAE* URGING AFFIRMANCE

INTEREST OF AMICUS

Public Citizen, Inc. ("Public Citizen") is a non-profit corporation founded by Ralph Nader in 1971 to represent and advance the interests of consumers. On behalf of its approximately 40,000 contributors, Public Citizen respectfully urges that the judgment below be affirmed and that New Hampshire's residence requirement for admission to the Bar be held unconstitutional.

Although Public Citizen supports appellee's right to practice law in New Hampshire, this brief, which is filed with the consent of the parties, is being submitted in order to em-

phasize the importance of this case to the clients who are consumers of legal services in New Hampshire. Regulation of admission to the Bar and oversight of the conduct of lawyers is not an end in itself, but rather a means of assuring that clients will be well served by honest and capable attorneys who charge reasonable fees. Those ends are not promoted by the residence requirement under challenge, but would be advanced by allowing qualified nonresidents to become members of the New Hampshire Bar and thereby increase the pool of attorneys available to represent clients.

Public Citizen has long been active in efforts to eliminate restrictions on Bar admissions and on the practice of law generally which make it more difficult for clients to obtain the legal services they desire. Public Citizen, through its Litigation Group, represented the plaintiff class in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and filed an *amicus* brief on behalf of consumer groups in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Public Citizen has also provided and is providing legal representation to a number of Bar applicants challenging residence requirements like that at issue in this case. *See, e.g., Gordon v. Committee on Character and Fitness*, 48 N.Y.2d 266, 397 N.E.2d 1039, 422 N.Y.S.2d 641 (1979); *In re Judd*, 391 Mass. 227, 461 N.E.2d 760 (1984); and *Giller v. Virginia Board of Bar Examiners*, Civ. No. 83-1282-A (E.D. Va. February 8, 1984), *appeal pending*, No. 84-1259 (4th Cir.).

SUMMARY OF ARGUMENT

The states undoubtedly have the right, and indeed the obligation, to regulate the practice of law. However, their authority is not unlimited, since any restriction on admission to the Bar must ultimately be justified as being an appropriate means of assuring the applicant's fitness or capacity to practice law. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957); *In re Griffiths*, 413 U.S. 717 (1973). The principal justification for regulating Bar admissions is to

protect the clients whom applicants would represent if admitted.

The state of New Hampshire has demonstrated no satisfactory relationship between an applicant's state of domicile and his or her fitness or capacity to practice law. The restriction at issue here is especially ineffective as a regulatory measure because it applies only at the time of admission, and then vanishes. The discrimination against out-of-staters is supported by no more than broad generalizations of the sort that were found wanting when this Court held that aliens could not be denied admission to the Bar by virtue of alienage alone. *In re Griffiths, supra*. The rigorous standard of justification laid down by this Court in *Hicklin v. Orbeck*, 437 U.S. 518 (1978), requires invalidation of the New Hampshire residence requirement under the Privileges and Immunities Clause (Article IV, Section 2, Clause 1 of the Constitution), since it does not advance the interests of clients, who are the intended beneficiaries of Bar admission requirements. The restriction challenged here also violates the Commerce Clause because it unduly burdens the interstate practice of law by restricting the supply of attorneys in New Hampshire without a valid justification. The interests of clients will be advanced if the states are required to develop Bar admission standards which are narrowly directed to assure good character and knowledge of the law, rather than broadly excluding all applicants who reside in another state.

ARGUMENT

I. RESIDENCE REQUIREMENTS CAN BE UPHELD ONLY IF SHOWN TO BE CLOSELY TAILORED TO ASSURE AN APPLICANT'S FITNESS OR CAPACITY TO PRACTICE LAW.

In order to protect the interests of prospective clients, states have the right to assure that those admitted to the Bar are both qualified and trustworthy. As this Court stated in *In re Griffiths*, 413 U.S. 717 (1973), in which it invalidated a Connecticut court rule which excluded aliens from the Bar:

> It is undisputed that a State has a constitutionally permissible and substantial interest in determining whether an applicant possesses " 'the character and general fitness requisite for an attorney and counselor-at-law.' "

Id. at 722-23, *quoting Law Students Research Council v. Wadmond*, 401 U.S. 154, 159 (1971). The corollary to this principle is that "any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957).

The *en banc* Court of Appeals, while recognizing the pertinence of *Griffiths* and *Schware* to this case, was sharply divided on the issue of the degree of deference to be accorded a state's determination that a Bar admission requirement is in fact an appropriate means of assuring good character and fitness. The opinion of Judges Bowman and Coffin, affirming the judgment of the district court, applied the rigorous standard of review set out in *Hicklin v. Orbeck*, 437 U.S. 518 (1978). Jurisdictional Statement Appendix at 9a-10a. The two judges who would have overturned the district court's judgment, Chief Judge Campbell and Judge Breyer, declined to apply a "highly stringent standard of proof," *id.* at 16a, and instead argued that the residence requirement should be upheld as "reasonably related to furthering the state's legitimate interest

in regulating the bar." *Id.* at 23a. The briefs of appellant and of the *amici* supporting it repeatedly urge that the states should be given great deference in setting Bar admission standards.

The standard of review applied in this case must be determined not by a characterization of the right to be admitted to the practice of law, but by the nature of the restriction which is being applied. A state is well within its rights if it wishes to impose standards for Bar admissions which are in certain respects more demanding than those of its sister states, such as by requiring a higher score to pass the Multistate Bar Examination, or prescribing minimum law school course distribution requirements, or undertaking an unusually rigorous investigation of the character of applicants. But where the standards for admission or for remaining a member of the Bar impinge on rights guaranteed by the Constitution, such as the Due Process Clause or the First Amendment, the Bar admission requirements must be shown to meet the applicable constitutional standard, or otherwise the constitutional protections would be diminished. *See, e.g., Schware v. Board of Bar Examiners, supra; In re R.M.J.*, 455 U.S. 191 (1982).

The requirement at issue here is a blanket exclusion of all nonresidents solely because of their nonresidence, which is precisely the type of discrimination at which the Privileges and Immunities Clause is aimed. Thus, in *Hicklin*, this Court noted that *Ward v. Maryland*, 12 Wall. (79 U.S.) 418 (1871), established "that a resident of one State is constitutionally entitled to travel to another State for purposes of employment free from discriminatory restrictions in favor of state residents imposed by the other State," and that *Toomer v. Witsell*, 334 U.S. 385 (1948), and *Mullaney v. Anderson*, 342 U.S. 415 (1952), reaffirmed that principle. 437 U.S. at 525-26. While this Court has recognized a narrow exception to the Privileges and Immunities Clause where the right being sought is an unimportant one, *see Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371 (1978) (sport hunting for elk),

appellant does not claim that the right of a qualified applicant to practice law comes within that exception.

Rather, the state argues that *Hicklin* is inapplicable because lawyers "exercise state power on a daily basis." Appellant's Brief at 12. However, if appellant were correct in its assertion that it is the nature of the activity regulated (the practice of law) which determines the standard of review, rather than the nature of the discrimination which is being challenged (state citizenship), the result in *Griffiths* would have been exactly opposite to what it was. Thus, even though this Court acknowledged in *Griffiths* that attorneys are "officers of the Court", it nonetheless applied the strict scrutiny which is triggered by a classification based on alienage. 413 U.S. at 721-22. Accordingly, the fact that the discrimination against nonresidents which is at issue here involves Bar admission does not warrant a departure from the rigorous standard of review set forth in *Hicklin v. Orbeck* for claims under the Privileges and Immunities Clause.

II. THE CHALLENGED RESIDENCE REQUIREMENT IMPERMISSIBLY IMPEDES THE INTERSTATE PRACTICE OF LAW, TO THE DETRIMENT OF CLIENTS WHO DESIRE TO FIND COMPETENT REPRESENTATION AT A PRICE THEY CAN AFFORD.

Even though appellee's principal challenge to New Hampshire's residence requirement is based on the Privileges and Immunities Clause, it is useful to analyze the validity of the requirement under the Commerce Clause as well. Appellee's Commerce Clause argument was not ruled on by the courts below, but she may seek affirmance on the basis of any legal argument for which there is support in the record. *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982). Consideration of the Commerce Clause is especially appropriate here since in *Hicklin v. Orbeck*, *supra*, this Court recognized "the mutually

reinforcing relationship between the Privileges and Immunities Clause of Art. IV and the Commerce Clause." 437 U.S. at 531.

While litigation under both the Privileges and Immunities Clause and the Commerce Clause is usually brought by nonresidents who wish to enter the discriminating state to do business, both constitutional provisions also protect the consumers who will utilize the services provided and who thus are the indirect beneficiaries of the increased competition brought about by opening up the relevant market. In this case, the "consumers" are the clients or potential clients who may wish to hire a lawyer licensed in New Hampshire, including possibly a nonresident lawyer who meets the client's needs. Thus, those seeking legal services are adversely affected if admission requirements unduly restrict the number of attorneys available to serve them or make it less likely that the services they seek will be available at a price they can afford. The effects of the residence requirement are felt both by residents of New Hampshire, who are denied a wider choice of attorneys, and by residents of other states who have legal business in New Hampshire and who would prefer to use nonresident attorneys who are otherwise qualified for admission to the New Hampshire Bar.

The state's response is that this case does not involve "simply *economic* concerns". Appellant's Brief at 12 (emphasis in the original). Obviously, this case does involve more than economics, but by the same token it is clear that the state's regulation of admission to the Bar has economic effects on clients as well as on those already admitted to the Bar and those seeking admission. As this Court recognized in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the practice of law can affect interstate commerce, and in *Bates v. State Bar of Arizona*, 433 U.S. 350, 371-72 (1977), this Court observed that "the belief that lawyers are somehow 'above' trade has become an anachronism."

In any event, there is no support for appellant's suggestion that economic protectionism which violates the Commerce

Clause may somehow be saved from invalidity because it also involves non-economic concerns. Indeed, in numerous cases this Court has applied the Commerce Clause to strike down state regulations which ostensibly served such vital concerns as protecting the health and safety of a state's citizens. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

Perhaps the clearest indication of the purpose and effect of New Hampshire's residence requirement is the candid admission of the two judges on the Court of Appeals who would have upheld the rule:

> We recognize at the outset that New Hampshire's rule may serve the less than commendable purpose of insulating New Hampshire practitioners from out-of-state competition. It may discourage those with New Hampshire legal problems from choosing lawyers residing outside New Hampshire to represent them for two reasons. First, a nonresident lawyer who is fully familiar with New Hampshire law cannot explain this latter fact to the client by pointing to bar membership. Second, the nonresident lawyer may have to pay a fee to a New Hampshire bar member to associate the bar member with the case, should a court appearance prove necessary.

Jurisdictional Statement Appendix at 16a (Opinion of Campbell, C.J., and Breyer, J.). *See also id.* at 11a-12a n.6 (Opinion of Bownes and Coffin, JJ.). This restriction not only serves a "less than commendable" purpose, but it is an impermissible restraint on interstate commerce. While the Commerce Clause does not preclude a state from imposing nondiscriminatory regulations on competitors who wish to enter from out of state, it does preclude economic protectionism. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 335 (1977); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see Toomer v. Witsell, supra*, 334 U.S. at 407-09

(Frankfurter, J., concurring, joined by Jackson, J.); *id.* at 409-10 (Rutledge, J., concurring). "[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected . . . . The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

Chief Judge Campbell and Judge Breyer were by no means the first observers to discern the protectionist nature of Bar admission requirements like that challenged here. Former American Bar Association President Chesterfield Smith has stated that "[m]any of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition." *Time for a National Practice of Law Act*, 64 A.B.A.J. 557 (1978). *See also Shelry v. Alaska Bar Ass'n*, 620 P.2d 640, 646 (Alaska 1980) (describing a residence requirement as a form of "economic protectionism"); Horack, *"Trade Barriers" to Bar Admissions*, 28 J. Am. Judic. Soc. 102 (1944) ("an examination of requirements for admission to the bar shows a distinct leaning toward the protection of the local student and the local lawyer with much the same effect as is created by ordinary trade barriers"). Because of the "protectionist nature" of the New Hampshire residence requirement, it is an invalid restraint on interstate commerce. *See South-Central Timber Development, Inc. v. Wunnicke*, 104 S. Ct. 2237, 2247 (1984) (plurality opinion).

Even if the New Hampshire residence requirement did not serve a protectionist purpose, it would nonetheless violate the Commerce Clause because of its discriminatory effect on interstate commerce. *See Bacchus Imports, Ltd. v. Dias*, ____U.S.____ (June 29, 1984). "[T]he incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack. Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause." *Kassel v. Con-*

Consolidated Freightways Corp., *supra*, 450 U.S. at 670. *See also Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 37 (1980)("The principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects").

The inevitable effect of New Hampshire's residence requirement is to exclude from Bar membership qualified applicants who are otherwise ready, willing, and able to serve New Hampshire clients, but who live outside the state. As the New Jersey Supreme Court observed in *In re Sackman*, 90 N.J. 521, 530, 448 A.2d 1014, 1019 (1982):

> We assume, and believe, that the more qualified lawyers in New Jersey, the better the public will be served; that potential clients of all income levels will benefit from more lawyers being available; that the increase in competition may have the beneficial effect of lowering fees; that if any risks to the public interest are caused by such increased competition, they can be controlled by this Court; and that the adverse economic impact, if any, on lawyers now practicing in New Jersey is no more relevant to the issue before us than it is to the number of new attorneys admitted as a result of each new bar examination.

III. THE JUSTIFICATIONS OFFERED TO SUPPORT THE RESIDENCE REQUIREMENT ARE INSUFFICIENT UNDER BOTH THE PRIVILEGES AND IMMUNITIES CLAUSE AND THE COMMERCE CLAUSE.

The premise upon which appellant's argument is based is that clients benefit from the exclusion of nonresidents from the New Hampshire Bar, since those who are residents at the time of admission are, as a class, likely to provide better representation to clients than those who are nonresidents at admission. Not only is appellant's contention unsupported by

any evidence, but the state's class-based discrimination would be an improper basis for excluding nonresidents from the Bar even if it were based on fact. As this Court observed in an analogous context, "the possibility that some resident aliens are unsuited to the practice of law [cannot] be a justification for a wholesale ban." *In re Griffiths*, *supra*, 413 U.S. at 725. *See also id.* at 727; *Bernal v. Fainter*, 104 S. Ct. 2312, 2320 (984) (invalidating a Texas statute disqualifying all aliens from becoming notaries public). In any event, there is no support at all for the notion that nonresidents as a group will be less qualified than those who are residents at the time of admission. Appellee has, after all, passed the New Hampshire Bar examination, and she will be required to take a practical skills course within a year of her admission. *See* New Hampshire Supreme Court Rule 42(7). She is subject to a full review of her character, as well as to discipline or disbarment if she fails to live up to her responsibilities as an attorney.

Appellant and the *amici* supporting its position have asserted that a number of benefits accrue to the public and the legal profession because of New Hampshire's residence requirement, but it appears highly unlikely that any of the benefits described are actually achieved to any appreciable degree. For example, appellant emphasizes that "the New Hampshire court expects its attorneys to provide legal services to the state's criminal defendants and *pro bono* clients" and that it "expects its attorneys to prepare and participate in continuing legal education programs and serve on committees of the integrated bar." Appellant's Brief at 19-20. While there is a facial plausibility to these asserted goals, upon reflection it becomes clear that they cannot be advanced by the residence requirement. For example, so long as appellee remains a resident of Vermont, appellant's asserted purposes are frustrated because appellee will not be able to practice law in New Hampshire, and thus will not be eligible to represent New Hampshire clients on a *pro bono* basis. Likewise, as one denied admission to the New Hampshire Bar, appellee is not a likely participant in the Bar's educational programs or committees.

On the other hand, if appellee ultimately loses this case and decides to move to New Hampshire to become a member of the Bar, then perhaps there will be some incremental benefit to New Hampshire of the kind described. However, any gain that results will presumably be at the expense of Vermont, where appellee now lives and where, under appellant's argument, she would no longer participate in voluntary professional activities. This would be just the sort of "economic Balkanization" which the Commerce Clause is intended to prevent. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

There is, of course, a third alternative. Appellee could move to New Hampshire and be admitted, and then move back to Vermont a year later while remaining a member of the New Hampshire Bar. That way she could legally be a member of both Bars. Except for the inconvenience to appellee and those who wish to retain her, that sequence of events would lead to results very similar to a situation in which there was no New Hampshire residence requirement, yet the requirement would have been fulfilled. The explanation for this curious result is that New Hampshire's residence requirement evaporates the moment an applicant is admitted to the Bar.*

Based on the foregoing, *amicus* Public Citizen respectfully suggests that it is extremely unlikely that clients derive any benefit from a residence requirement such as New Hampshire's. On the other hand, such a rule undoubtedly reduces the number of qualified attorneys available to handle a given legal matter, and thus has the effects of increasing the fees which must be paid by clients for legal services and reducing the choice of lawyers available to clients who need the services of a member of the New Hampshire Bar. The adverse effects on clients may be especially pronounced in the case of a small Bar like New Hampshire's, where a client may find it

* An applicant who had moved to New Hampshire shortly before being admitted to the Bar would no doubt be prudent to remain a resident long enough to demonstrate that he or she actually was a resident of New Hampshire at the time of admission.

difficult to retain a resident attorney who is qualified to handle a matter calling for special expertise or to bring a case (such as an action for legal malpractice) which is likely to be unpopular with the local bar.

Finally, several of the states that have filed *amicus* briefs in support of appellant have Bar admission rules that undermine New Hampshire's contention that a residence requirement is necessary to adequately serve the state's interests. Tennessee, for example, allows nonresidents to be admitted to the Bar if they live close to the state line (*see* Brief of the State of Tennessee as Amicus Curiae, at 4), a standard which would allow appellee to be admitted if New Hampshire adopted it. *See* Joint Appendix at 25 (appellee lives less than 400 yards from the New Hampshire border). The state of Wisconsin, which has joined the *amicus* brief filed by the Commonwealth of Virginia, *et al.*, has no residence requirement for admission to the Bar, although the Wisconsin State Bar Board of Governors has urged that such a requirement be reimposed. Brief of the Commonwealth of Virginia, *et al.*, at 2 n.1. Indiana has no residence requirement for admission, requiring only an affidavit stating an intent to practice law in Indiana within two years after being admitted.

These examples simply underscore the point that there is no adequate justification for a blanket exclusion of nonresidents from a state's Bar. If the goal is assuring competence or familiarity with local procedure, or protecting clients against fraud, or establishing that the applicant has a connection with the admitting state sufficient to warrant admission to the Bar, the state should be required to promote those goals by means "more closely tailored" to achieve them without unduly disadvantaging qualified nonresidents, *Hicklin v. Orbeck*, *supra*, 437 U.S. at 528, and without unnecessarily burdening interstate commerce. By invalidating the New Hampshire residence requirement, this Court can help to assure that state regulation of the Bar is directed toward its proper purpose, the protection of clients, rather than toward protection of the economic interests of the legal profession.

CONCLUSION

The judgment appealed from should be affirmed on the basis of both the Privileges and Communities Clause and the Commerce Clause.

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AMICUS CURIAE

BRIEF

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In The

Supreme Court of the United States

October Term, 1983

SUPREME COURT OF NEW HAMPSHIRE

Appellant,

vs.

KATHRYN A. PIPER,

Appellee.

On Appeal from the United States Court of Appeals for the First Circuit

BRIEF OF THE VERMONT BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of Amicus Curiae 1

Summary of Argument 2

Argument:

I. Rule 42 of the New Hampshire Supreme Court Unfairly Discriminates Against Attorneys Who Do Not Live in New Hampshire. 3

A. The Residency Requirement Does Not Promote Familiarity With Local Rules and Practices, or Laws and Rules of the State of New Hampshire. 6

B. Residency Does Not Promote Accessibility to Legal or Disciplinary Proceedings. 9

C. Residency Alone Does Not Significantly Promote High Standards of Ethics and Competency, or Commitment to Pro Bono Activities Within the State. 9

II. New Hampshire's Residency Requirement Protects New Hampshire Lawyers from Competition and Thereby Increases Costs to Consumers of Legal Services. 11

Conclusion 12

Appendices:

I. Uniform and Model Laws Adopted by New Hampshire ..... App. 1

II. Names and Office Locations of Attorneys on Civil Cases for September 1986 Term in Grafton, New Hampshire Superior Court ..... App. 3

III. Number and Location of Vermont Attorneys Practicing within 25 Miles of New Hampshire ..... App. 6

IV. Number and Location of New Hampshire Attorneys Practicing within 25 Miles of Vermont Border ..... App. 7

TABLE OF AUTHORITIES

Cases

	Pages
Bates v. State Bar of Arizona, 433 U.S. 350 (1977)	6
City of Philadelphia v. New Jersey, 437 U.S. 617 (1978)	5
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)	6
Hicklin v. Orbeck, 437 U.S. 518 (1978)	8
Lee v. Flynt, 439 U.S. 438 (1978)	3, 8, 10
Matter of Judd, 391 Mass. 227, 461 N.E.2d 769 (1984)	7
Philadelphia v. New Jersey, 437 U.S. 617 (1978)	11
Toomer v. Witsell, 334 U.S. 385 (1948)	4

Constitutional Provisions

Privileges and Immunities Clause, Art. IV, §2 of the United States Constitution	4, 9
Commerce Clause, Art. I, §8 of the United States Constitution	5

Statutes and Rules

1979 Vt. Acts 176	2
New Hampshire Supreme Court Rule 37	9
New Hampshire Supreme Court Rule 42	3, 4, 5, 6

Other Authorities

American Bar Association, Comprehensive Guide to Bar Admission Requirements	6
Bartel & Lah, *Regulating the Multistate Practice of Law*, 30 Wash. L. Rev. 639 (1973)	8
B. Curran, *The Legal Profession in the 1980's* (April 1986) (report of the American Bar Foundation)	4
Martindale-Hubbel Law Directory, (116th ed. 1984)	12
New Hampshire Law Director and Daybook (ed. 1984)	12
Vermont Year Book (J. Hemenburger ed. 1984)	12
Note, A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV, 92 Harv. L. Rev. 1861 (1979)	8

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BRIEF OF THE VERMONT BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLEE

INTEREST OF AMICUS CURIAE

The Vermont Bar Association is a non-profit corporation incorporated by the Vermont Legislature in 1878 to "cultivate the science of jurisprudence, to promote reform

in the law; to facilitate the administration of justice; to elevate the standard of the legal profession; to cherish a fraternal spirit among its members, and to perpetuate their memory." 1878 Vt. Acts 176. The Vermont Bar Association, therefore, has a statutory mandate to attempt to abolish anachronisms in the law and to promote the interests of its members in practicing unimpeded by parochial restrictions.

In this case the Court is asked to decide whether restrictions on the eligibility of lawyers to be admitted to the New Hampshire bar are unreasonably discriminatory and unfair. The decision will have a significant impact on the ability of Vermont Bar Association members to practice their profession beyond state boundaries. The Association's purpose in filing this brief is to illustrate the harsh discriminatory impact of New Hampshire's residency requirement on attorneys in neighboring states, especially Vermont. The Vermont Bar Association, as amicus curiae, urges affirmation of the opinion of the court below.

SUMMARY OF ARGUMENT

New Hampshire's requirement that a lawyer be a resident at the time of admission unfairly discriminates against Vermont and other out-of-state attorneys who seek admission to the New Hampshire bar. In a thinly disguised attempt to protect resident attorneys from out-of-state competiton, New Hampshire claims that the state has legitimate interests to protect by excluding nonresident lawyers. New Hampshire claims that such a policy promotes an increased level of competence and ethics but fails to explain how these virtues are related to residency on the day of admission. Since there is no requirement that a lawyer maintain his residency, the logic of New Hampshire's argument fails. Further, since every lawyer admitted to practice in New Hampshire must pass the state's bar examination, New Hampshire already has a formal, structured procedure for evaluating each lawyer's competence and knowledge of ethical standards.

In addition, the residency requirement creates a burden on the citizens of New Hampshire by limiting the competition for the legal services now provided by the New Hampshire bar. It is classical economics that increased competition in any industry (including a service industry) tends to reduce prices and increase the quality of service. For both reasons, New Hampshire's requirement of residency as a condition of admission to the bar should be invalidated.

ARGUMENT

I. Rule 42 of the New Hampshire Supreme Court Unfairly Discriminates Against Attorneys Who Do Not Live in New Hampshire.

Rule 42 of the New Hampshire Supreme Court ("Rule 42") does not expressly prohibit the admission of nonresident attorneys to the New Hampshire bar. It merely requires that applicants to New Hampshire's bar examination either be New Hampshire residents, or state their intent to become New Hampshire residents. Nevertheless, the New Hampshire Supreme Court ("New Hampshire")

Further, the Commerce Clause of Art. I, Section 8 of the United States Constitution prohibits a state from enforcing a statute that has the effect of economically isolating and protecting its residents, except where a significant and legitimate state purpose is served by the restrictive statute:

> [W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. (citations omitted). The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a state's borders.

City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). New Hampshire's Rule 42 functions to block interstate commerce at its borders because it blocks nonresident lawyers from crossing the New Hampshire border to conduct their commercial activities (their legal practice), in New Hampshire.

This Court has noted that the practice of law is becoming increasingly mobile and specialized. *Leis v. Flynt*, 439 U.S. 438, 442 (1979). This increase in mobility and specialization is impeded by residency requirements such as Rule 42. Attorneys can establish residence in only one state but may desire to establish a multi-state practice. Attorneys who specialize are especially vulnerable to the effects of residency requirements, since the available clientele in one state may be insufficient to support their specialized practice. This is especially true in sparsely populated areas, such as the northern regions of Maine, New Hampshire and Vermont.

The key question, under either a Privileges and Immunities or a Commerce Clause analysis, is whether the state's interest in excluding nonresident attorneys from

has taken the position that Rule 42 requires residency on the day of admission, along with a good faith intent to remain a resident. Brief for Appellant at 28.

Although cloaked in rhetoric of concern for the need to maintain an informed and ethical bar, New Hampshire's arguments in support of exclusion of nonresident attorneys from the bar are merely rationalizations to shield New Hampshire attorneys from competition. Rule 42 unfairly discriminates against nonresident lawyers, not because they are less informed, ethical or capable, but merely because they live beyond the state's borders.

The Privileges and Immunities Clause of Art. IV bars discrimination against nonresidents in pursuit of their trade, except where the discrimination is aimed at eliminating the particular "evil" that the nonresidents create. *Hicklin v. Orbeck*, 437 U.S. 518, 524-25 (1978); *Toomer v. Witsell*, 334 U.S. 385 (1948). This Court has held that the practice of law is within the realm of trade and commerce. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 778 (1975) ("[T]he exchange of . . . a service for money is commerce in the most common usage of that word. It is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect . . . ."); *Bates v. State Bar of Arizona*, 433 U.S. 350, 368, n. 19 (1977) ("'[L]aw offices are big businesses . . . . [T]he argument may be made that to term them noncommercial is sanctimonious humbug.'"). Of the 545,335 attorneys admitted to practice in the United States in 1980, 68 percent were engaged in private (i.e. for profit) practice.[1]

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[1] B. Curran, The Legal Profession in the 1980's (April 1984) (report of the American Bar Foundation).

admission is sufficient to justify the discrimination. New Hampshire asserts that admission of nonresidents will injure the quality of the bar because nonresident attorneys 1) will be less knowledgeable about New Hampshire Law, 2) will have less incentive to develop their professional reputations, and 3) will be less accessible to court and disciplinary proceedings. Brief for Appellant at 29.

A. The Residency Requirement Does Not Promote Familiarity With Local Rules and Practices, or Laws and Rules of the State of New Hampshire.

Before any lawyer can be admitted to practice in New Hampshire, that lawyer must demonstrate an acceptable knowledge of the substantive and procedural laws and ethical standards by passing a written bar examination. Rule 42(1), (7). Unlike the 31 states that admit experienced lawyers on motion,[1] New Hampshire requires that every applicant successfully complete its written bar examination. Thus, New Hampshire has established a formal, structured mechanism through which every applicant is individually evaluated on his knowledge of New Hampshire law, procedure and ethics. To say, as New Hampshire does, that an applicant's residency at the moment of admission adds any additional assurance of quality *ex post facto* belief.

Nor does the commitment to live in New Hampshire add anything meaningful. If there is any logic to New Hampshire's position, it is the truism that a lawyer's knowledge will grow as his experience grows. It is the

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[1]American Bar Association, Comprehensive Guide to Bar Admission Requirements (1984).

lawyer's practice, not his residence, that will increase the lawyer's experience. There is no reason to expect that Ms. Piper's experience will develop any differently simply because she must cross the New Hampshire border some 680 yards from her home. Joint App. at 25. If New Hampshire were truly serious about its claim that residency promotes familiarity with the state's laws, it would require attorneys to retain their residence in the state. New Hampshire does not have this requirement. Indeed, in 1981, over 13% of the attorneys admitted to practice in New Hampshire resided outside of New Hampshire.[2]

The argument that residency increases familiarity with state laws and practice was most recently rejected by the Supreme Judicial Court of Massachusetts, which held that Massachusetts' residency requirement for bar applicants seeking admission on motion violated the Privileges and Immunities Clause. The Massachusetts court stated:

> It is not apparent that residency is a measure of familiarity with local practice or of the willingness of an attorney to learn local procedure. . . . If there were a basis for the conclusion that nonresident attorneys are not conversant with Massachusetts practice, a requirement of an examination on local practice for those seeking admission . . . might be adopted as less discriminatory than a residency requirement.

Matter of Jadd, 391 Mass. 227, 234, 461 N.E.2d 789, 794-95 (1984).

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[2]In 1981, the New Hampshire bar was composed of approximately 1,976 members (based on information obtained from Gail Kinney, Executive Director of the New Hampshire Bar Association). 269 out-of-state lawyers (Joint App. at 30) constituted approximately 13.6% of the total New Hampshire bar.

Furthermore, even if residency promoted the ability of a lawyer to learn the "unique" character of New Hampshire law, that consideration is becoming less significant as New Hampshire's law becomes less unique. Generally, it has been recognized that substantive laws are tending to become more uniform between states. *See Leis v. Flynt*, 439 U.S. at 449, (Stevens, J., dissenting); Note, A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV, 97 Harv. L. Rev. 1461, 1486 (1979); Barkel & Loh, *Regulating the Multistate Practice of Law*, 50 Wash. L. Rev. 699-706 (1975). Indeed, New Hampshire itself has adopted more than 40 uniform laws. *See* App. I.

B. Residency Does Not Promote Accessibility to Legal or Disciplinary Proceedings.

New Hampshire asserts that its residency requirement facilitates New Hampshire's interest in ensuring that "all attorneys are readily available for court proceedings and easily subject to disciplinary action." Joint App. at 34. If New Hampshire required its lawyers to live within a certain distance of the courthouse, or limited a lawyer's practice to the county of his own residence, this argument would have some merit. New Hampshire does not have such a requirement. The September 1984 Court Calendar for Grafton (New Hampshire) Superior Court (*see* App. II) illustrates the fallacy of New Hampshire's logic. Ms. Piper's residence of Lower Waterford, Vermont is approximately 21 miles from the court house in Haverhill, New Hampshire. Of the 53 lawyers[4] or firms representing

[4]There were actually 55 lawyers or law firms on the Grafton Superior Court Calendar, but the addresses of 2 lawyers could not be located.

civil litigants, only 2 have offices closer than Ms. Piper's Vermont residence.

The ability to discipline lawyers is also unaffected by residency. All New Hampshire attorneys are subject to discipline for misconduct pursuant to New Hampshire Supreme Court Rule 37. This rule also provides for reciprocal action in New Hampshire if a New Hampshire attorney is disciplined in another state. New Hampshire has not explained in its brief how resident attorneys are more "easily subject to disciplinary action" than nonresident attorneys.

C. Residency Alone Does Not Promote High Standards of Ethics and Competency, or Commitment to Pro Bono Activities Within the State.

New Hampshire states that the residency requirement "ensures that attorneys admitted to practice in the State of New Hampshire maintain high standards of ethics, as well as competency, as residency within the state reinforces a practicing attorney's interest in his or her reputation as a lawyer in the legal community." Joint App. at 33. This argument is unpersuasive. If there is any merit to New Hampshire's position, it is that most lawyers work to develop a favorable reputation within the legal community in which they practice. It would be illogical to suggest that Ms. Piper would have a diminished pride in her professional reputation within the community in which she practiced solely because she resided 400 yards beyond the New Hampshire border. It would be equally illogical to say the same of a Manchester, New Hampshire lawyer simply because he resided in neighboring Bedford, New Hampshire.

If the distance between a lawyer's practice and his residence were a meaningful factor, the lawyers in the southern counties of New Hampshire ought not to try cases in the northern counties. Yet, as a matter of practice, 20% of the lawyers on the civil docket in Grafton County are from distant Hillsborough County. *See* Apps. II, IV.

There have been instances where justice has been served only by out-of-state attorneys, because strong, local feelings have prevented adequate representation by local counsel. Historical examples include activities of Andrew Hamilton, Clarence Darrow, Daniel Webster, Charles Evans Hughes and Thurgood Marshall. *Leis v. Flynt*, 439 U.S. at 450, (Stevens, J., dissenting). In cases such as this, the peer and community pressure to which New Hampshire refers can act contrary to the interests of justice.

New Hampshire also claims that admission of nonresident attorneys will cause a disproportionate burden of providing voluntary services to fall on the resident bar. This argument fails to explain how that disproportionate burden is prevented in connection with the 13% of the New Hampshire bar which presently resides out of state.[5] Nor does it explain why this burden couldn't be fairly allocated among attorneys *practicing* within the state, regardless of the lawyers' residences. Naturally, it would be difficult to assign an indigent defense case to a lawyer residing in California, but, presumably such a lawyer would have a limited practice in New Hampshire. On the other hand, if Ms. Piper resided in Lower Waterford, Vermont and

[5]See footnote 3 supra.

practiced full-time in Littleton, N.H., there would be no problem expecting her to share a proportionate share of the normal voluntary service provided by the New Hampshire bar.

II. New Hampshire's Residency Requirement Protects New Hampshire Lawyers from Competiton and Thereby Increases Costs to Consumers of Legal Services.

Not only is New Hampshire's protectionist rule unfair to Vermont attorneys who would like to practice in New Hampshire, it is also damaging to the economic interest of the citizens of New Hampshire. To the extent that this rule limits access to New Hampshire by out-of-state attorneys, it reduces competition for the market presently served by the New Hampshire bar.

Reduction of out-of-state competition is the hallmark of economic protectionism. *See Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Since reduction of competition tends to increase prices, it is probable that consumers in New Hampshire are compelled to pay more for legal services.

Another way in which the New Hampshire rule contributes to higher cost of legal services can be inferred from reference to the maps in Appendices III and IV. Individual consumers seeking representation in New Hampshire can use only New Hampshire-admitted lawyers, even if the consumer lives near the state border and is closer to an out-of-state lawyer. A resident seeking a law firm of a certain size or expertise may have to travel even further. For example, an individual from Littleton (located at the northwest corner of Grafton County), New Hampshire, would have a choice of 13 attorneys. The largest law firm

in Littleton has four attorneys. In the seven contiguous New Hampshire towns, there are only four other attorneys. Just across the Vermont border, in the town of St. Johnsbury, there are approximately 38 lawyers, including four law firms of three or four lawyers each, and one law firm with ten lawyers in its St. Johnsbury office.[4] Obviously, not all Vermont lawyers would seek admission to the New Hampshire bar if the residency restriction was removed, but some lawyers would.

This effect would be even greater where a New Hampshire consumer lived near a large Vermont population center but in a nonpopulous New Hampshire community. For example, the city of Brattleboro, Vermont has approximately 34 lawyers. The contiguous New Hampshire border towns of Chesterfield, Hinsdale, and Westmoreland have only one lawyer. *See* App. IV.

CONCLUSION

For the reasons stated, the Vermont Bar Association urges this Court to affirm the decision of the court below overturning the residency requirement of the Supreme Court of New Hampshire.

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[4]These figures are derived from Martindale-Hubbell Law Directory (116th ed. 1984), Vermont Year Book (ed. 1984) and New Hampshire Law Directory and Daybook (ed. 1984).

APPENDIX I

Uniform and Model Laws Adopted by New Hampshire

Uniform Acknowledgments Act, N.H. Rev. Stat. Ann. § 456:1 et seq. (1968)
Uniform Act on Blood Tests to Determine Paternity, N.H. Rev. Stat. Ann. § 522.1 et seq. (1974)
Uniform Aircraft Financial Responsibility Act, N.H. Rev. Stat. Ann. § 422-A:23 (1983)
Uniform Anatomical Gift Act, N.H. Rev. Stat. Ann. § 291-A:1 et seq. (1977 & Supp. 1981)
Uniform Bills of Lading Act, N.H. Rev. Stat. Ann. § 334:44 et seq. (1966 & Supp. 1981)
Uniform Business Records As Evidence Act, N.H. Rev. Stat. Ann. § 521:1 et seq. (1974)
Uniform Child Custody Jurisdiction Act, N.H. Rev. Stat. Ann. § 458-A:1 et seq. (1983)
Uniform Choice of Forum Act, N.H. Rev. Stat. Ann. § 508-A:1 et seq. (Supp. 1979)
Uniform Commercial Code, N.H. Rev. Stat. Ann. Chap. 382-A (1961 & Supp. 1981)
Uniform Common Trust Funds Act, N.H. Rev. Stat. Ann. § 391:1 et seq. (1983)
Uniform Conditional Sales Act, N.H. Rev. Stat. Ann. § 361:10-2 et seq. (1966 & Supp. 1981).
Uniform Criminal Extradition Act, N.H. Rev. Stat. Ann. § 612:1 et seq. (1974)
Uniform Custody & Escheatment of Unclaimed and Abandoned Property Act, N.H. Rev. Stat. Ann. § 471-A:1 et seq. (1983)
Uniform Divorce Recognition Act, N.H. Rev. Stat. Ann. § 459:1 et seq. (1968 & Supp. 1979)
Uniform Estate Tax Apportionment Act, N.H. Rev. Stat. Ann. § 88-A:1 et seq. (1970)
Uniform Facsimile Signature of Public Officials Act, N.H. Rev. Stat. Ann. § 93-A:1 et seq. (1977)
Uniform Federal Tax Lien Registration Act, N.H. Rev. Stat. Ann. § 454-A:1 et seq. (1983)
Uniform Fraternal Act, N.H. Rev. Stat. Ann. § 418:41 (1983)

Uniform Fraudulent Conveyance Act, N.H. Rev. Stat. Ann. § 545:1 et seq. (1974)
Uniform Fresh Pursuit Act, N.H. Rev. Stat. Ann. § 614:1 et seq. (1974)
Uniform Gifts to Minors Act, N.H. Rev. Stat. Ann. § 463-A:1 et seq. (1968)
Uniform Limited Partnerships Act, N.H. Rev. Stat. Ann. § 305:1 et seq. (1966 & Supp. 1981)
Uniform Management of Institutional Funds, N.H. Rev. Stat. Ann. § 292-B:1 et seq.
Uniform Marriage Recognition Law, N.H. Rev. Stat. Ann. § 457:43 et seq. (1983)
Uniform Code of Military Justice, N.H. Rev. Stat. Ann. § 110-B:29 et seq. (1983)
Model Act for the Regulation of Credit Life and Credit Accident and Health Insurance, N.H. Rev. Stat. Ann. § 408-A:1 et seq. (1983)
Model Act Providing Remedies for the Unauthorized Practice of Law, N.H. Rev. Stat. Ann. § 311:7-2 et seq. (Supp. 1981)
Model State Administrative Procedure Act, N.H. Rev. Stat. Ann. § 541-A:1 et seq.
Model State Trademark Act, N.H. Rev. Stat. Ann. §350-A:1 et seq. (Supp. 1981)
Uniform Motor Vehicle Certificate of Title and Anti-Theft Act, N.H. Rev. Stat. Ann. § 261:1 et seq. (1977 & Supp. 1979)
Uniform Partnership Act, N.H. Rev. Stat. Ann. § 304-A:1 et seq. (Supp. 1981)
Uniform Act on Paternity, N.H. Rev. Stat. Ann. § 168-A:1 et seq. (1977 & Supp. 1981)
Uniform Photographic Copies of Business and Public Records as Evidence Act, N.H. Rev. Stat. Ann. § 329:1 et seq. (1974)
Uniform Preservation of Private Business Records Act, N.H. Rev. Stat. Ann. § 337-A:1 et seq. (1966)
Uniform Recognition of Acknowledgement Act, N.H. Rev. Stat. Ann. § 456-A:1 et seq. (Supp. 1979)
Uniform Rendition of Prisoners As Witnesses Act, N.H. Rev. Stat. Ann. § 613-A:1 et seq. (1974)

Uniform Securities Act, N.H. Rev. Stat. Ann. § 421-B:1 et seq. (1983)
Uniform Simultaneous Death Act, N.H. Rev. Stat. Ann. § 563:1 et seq. (1974)
Uniform Status of Convicted Persons Act, N.H. Rev. Stat. Ann. § 607-A:1 et seq. (1974)
Uniform Summoning Witnesses From Without a State Act, N.H. Rev. Stat. Ann. § 613:1 et seq. (1974)
Uniform Civil Liability for Support Act, N.H. Rev. Stat. Ann. § 546-A:1 et seq. (1974)
Uniform Reciprocal Enforcement of Support Act, 546-A:1 et seq. (1974 & Supp. 1981)
Uniform Testamentary Additions to Trusts Act, N.H. Rev. Stat. Ann. § 563-A:1 et seq. (1974)
Uniform Trustees' Power Act, N.H. Rev. Rev. Stat. Ann. §564-A:1 et seq. (1974 & Supp. 1981)
Uniform Unauthorized Insurers Act, N.H. Rev. Stat. Ann. § 406-B:1 et seq. (1983)
Uniform Warehouse Receipts Act, N.H. Rev. Stat. Ann. § 335:50 et seq. (1966 & Supp. 1981)

APPENDIX II

Names and Office Locations of Attorneys on Civil Cases for September 1984 Term in Grafton, New Hampshire Superior Court[1]

[1]Information derived from Court Calendar for Grafton, New Hampshire Superior Court, September 1984 Term.

[2]Derived from 1984 New Hampshire Law Directory & Daybook, and Martindale-Hubbell Law Directory (116th ed. 1984).

[3]The measurements are based on direct, point to point, distances. Highway distance would be greater. All distances are approximate and were scaled from Maine, New Hampshire and Vermont Highway Map, American Automobile Association (1979 ed.).

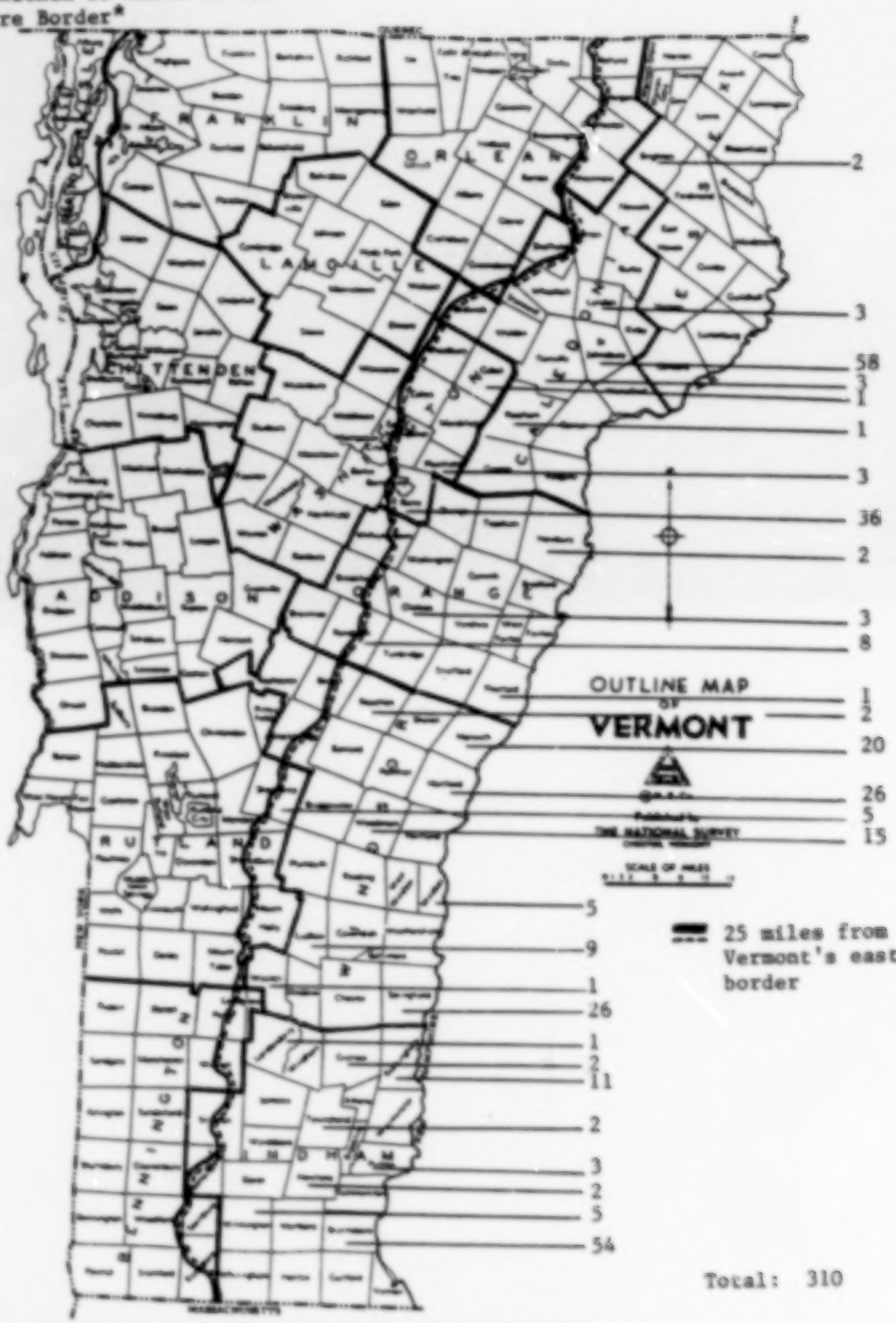
Name of Lawyer or Law Firm	City[2]	Miles from Grafton Superior Courthouse, Haverille, NH[3]
Anderson, Kenneth	Plymouth	26
Baldwin, Carolyn	Concord	60
Boyle, Gary	Littleton	22
Brennan, William	Manchester	75
Bruckner, Karl	Woodsville	8
Calamari & Calamari	Lancaster	38
Castello & Bruno	Woodsville	8
Cirone, Albert	Lebanon	28
Clausen, William	Hanover	24
Cleary, Gerald	Berlin	47
Cobb, Ivorey	Colebrook	64
Craig, Wenners and McDowell	Manchester	75
Cyr, J. Peter	Littleton	22
Daschbach & Kelly	Lebanon	28
Decker, Fitzgerald & Sessler	Laconia	45
Devine, Millimet, Stahl & Branch	Manchester	75
Eames, John	Littleton	22
Faulkner, Plaut, Hanna, Zimmerman & Freund	Keene	75
Fucci Law Offices	White River Jct., VT	30
Gardner, Lawrence	Hanover	24
Hall, Morse, Gallagher & Anderson	Concord	60
Hamblett & Kerrigan	Nashua	94
Hatfield & Bosse	Hillsborough	62
Hill, Barbara	Lebanon	28
Ingram & Ingram	Whitefield	30
Jones & Cooper	Lebanon	28

Kalled, James	Ossipee	47
Kelly, Edwin	Manchester	75
Kennedy, Beverly	Littleton	22
Killkelly, David	Laconia	45
Koury, Donald	Lebanon	28
Lachiatto, Alexander	Franklin	45
LoCascio, Donald	W. Lebanon	28
Maknis, Peter	Laconia	45
McCormack, John	Ashland	30
McDonough, A. J.	Manchester	75
McNamara Larsen & Schuster	Lebanon	28
Moulton, Smith, Samaha & Vaughan	Littleton	22
Mullaly & Trunzo	W. Lebanon	28
Pancoast, Thomas	Littleton	22
Ray & Hopkins	Plymouth	26
Robinson, Stanley	Franklin	45
Rolli & Presby	Littleton	22
Ryan, Kenneth	Lebanon	28
Shaines, Madrigan & McEachern	Portsmouth	88
Sheehan, Phinney, Bass & Greer	Manchester	75
Shepatin, David	Littleton	22
Slive, Michael	Ithaca, NY	over 100 miles
Stebbin, Bradley, Wood & Harvey	Hanover	24
Sulloway, Hollis & Soden	Hanover	24
Wadleigh, Starr, Peters, Dunn & Chiesa	Manchester	75
Wiggin & Nourie	Manchester	75
Yakovakis, James	Manchester	75

Appellee lives in Lower Waterford, 21 miles from Grafton County Court.

APPENDIX III

Number and Location of Vermont Attorneys Practicing Within 25 Miles of the New Hampshire Border*



Total: 310

*Information derived from Martindale-Hubbell Law Directory (116th ed. 1984) and the Vermont Year Book, 1984 edition.

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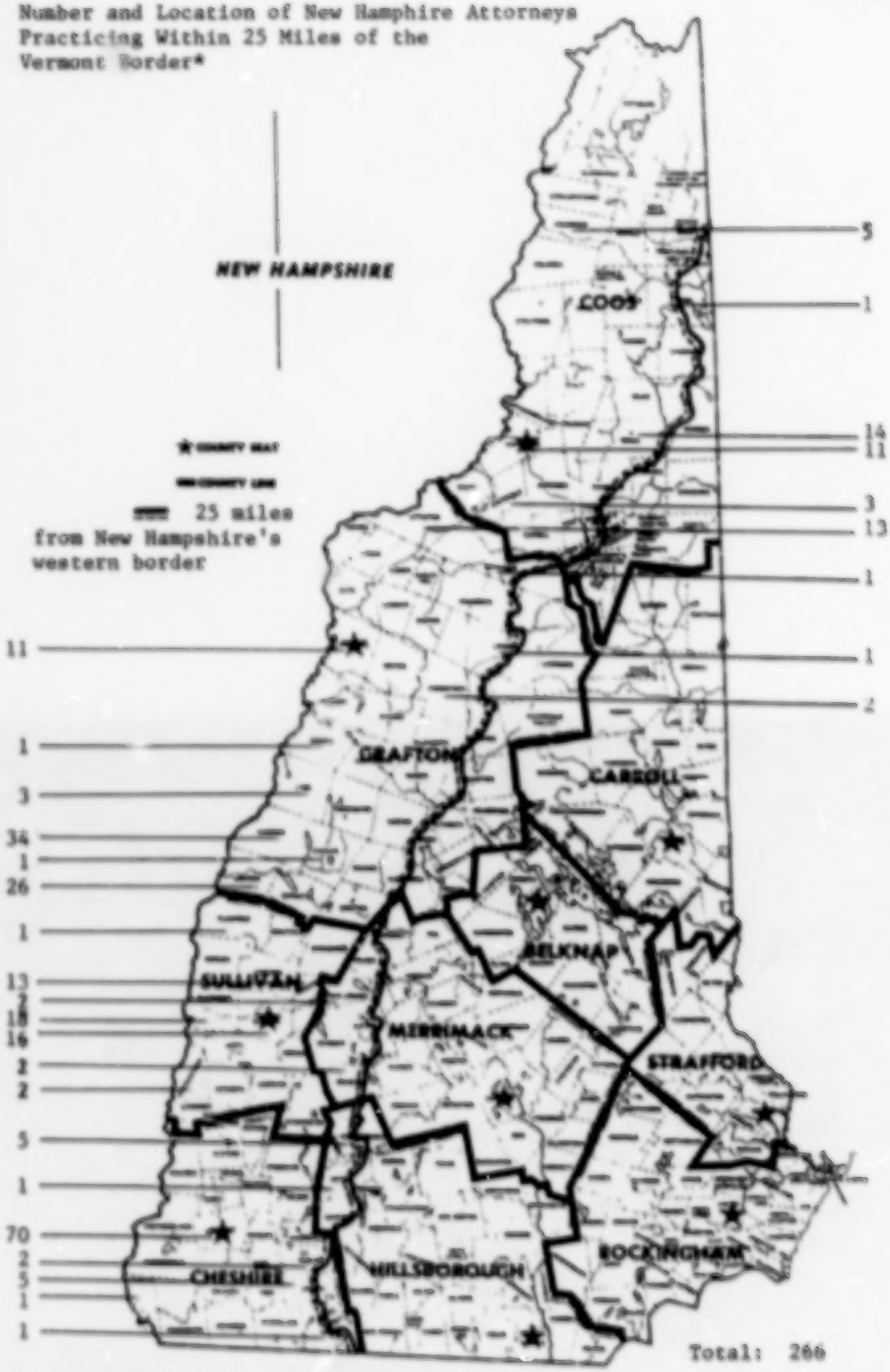
APPENDIX IV

Number and Location of New Hamphire Attorneys Practicing Within 25 Miles of the Vermont Border*



Total: 266

*Information derived from the New Hampshire Law Directory and Daybook, 1984 edition.

AMICUS CURIAE

BRIEF

Office - Supreme Court, U.S.
FILED
JUL 30 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1466

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SUPREME COURT OF NEW HAMPSHIRE,
Appellant,

v.

KATHRYN A. PIPER,
Appellee.

On Appeal from the United States Court of Appeals for the First Circuit

---

BRIEF OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE*	1
JURISDICTION	3
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. RESIDENCY REQUIREMENTS BURDEN INTERSTATE COMMERCE BY IMPEDING EFFICIENT DELIVERY OF LEGAL SERVICES	4
A. Many Corporations Have Created Corporate Law Departments to Provide More Efficient Delivery of Legal Services	4
B. Residency Requirements for Admission to the Bar Impede the Efficient Delivery of Legal Services to Corporations That Use Inside Counsel	6
C. Residency Requirements Impose Anti-Competitive Restraints on the Practice of Law	10
II. THERE IS NO LEGITIMATE STATE INTEREST TO PROTECT WHICH REQUIRES RESIDENCY FOR ADMISSION TO THE BAR	11
CONCLUSION	14

TABLE OF AUTHORITIES CITED

Cases:	Page
Bates v. State Bar of Arizona, 433 U.S. 350 (1977)	6
Giller v. Virginia Board of Bar Examiners, C.A. 83-1283-A (E.D. Va. February 8, 1984), 52 U.S.L.W. 2505, *appeal pending*, No. 84-1259 (4th Cir.)	7, 11
Hicklin v. Orbeck, 437 U.S. 518 (1978)	3, 11
Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977)	10, 13
In re Griffiths, 413 U.S. 717 (1973)	3
Schware v. Board of Bar Examiners, 353 U.S. 232 (1947)	3
United Building and Construction Trades Council v. City of Camden, —— U.S. ——, 104 S.Ct. 1020, 79 L.Ed.2d 249 (1984)	10
Constitutional Provisions:	
Article IV, Section 2, Clause 1 of the United States Constitution	3
Court Rules:	
Section 520.11 of the Rules for the Admission to the Court of Appeals of the State of New York	13
Miscellaneous:	
American Bar Association Model Rules of Professional Conduct, Adopted August 2, 1983	12
Directory of Corporate Counsel by Law & Business, Inc./Harcourt Brace Jovanovich, Publishers (1984-1985)	4, 5
Survey of Corporate Law Departments' Practices, Report of Arthur Young & Company to the Association of the Bar of the City of New York (December, 1983)	5

IN THE

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OCTOBER TERM, 1983

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SUPREME COURT OF NEW HAMPSHIRE,
Appellant,
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KATHRYN A. PIPER,
Appellee.

On Appeal from the United States Court of Appeals for the First Circuit

BRIEF OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

Amicus Curiae, American Corporate Counsel Association, supports the Appellee, Kathryn A. Piper, and respectfully requests this Court to affirm the action of the United States Court of Appeals for the First Circuit on a Rehearing *En Banc* which affirmed the decision of the United States District Court for the District of New Hampshire.

INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the American Corporate Counsel Association ("ACCA"), is composed of members of the bar who do not hold themselves out to the public for the

practice of law and who are engaged in the active practice of law solely on behalf of corporations, partnerships, and other organizations in the private sector. ACCA is the only national bar association whose efforts are devoted exclusively to the professional needs of attorneys who are members of the legal staffs of organizations in the private sector. ACCA has approximately 5,000 members who are employed as corporate counsel by some 700 organizations.

Not only do corporate law department attorneys make up an increasing portion of the bar, but they are doing an increasing percentage of the legal work of the organizations that employ them. A growing number of corporations have all or a large portion of their legal work, including trial work in various state and federal courts, performed solely by attorneys on their legal staffs. In essence, then, the type of legal work performed by ACCA members is no different from the work performed by attorneys practicing in law firms.

ACCA seeks to promote rules and procedures concerning access and admission to practice so that corporate counsel can manage adequately corporate legal affairs consistent with bar authorities' and ACCA's interest in maintaining high standards of competence. The question of residency as a qualification for bar admission is of great concern and importance to the members of ACCA and the clients they serve, inasmuch as it has impact upon the ability of corporate counsel to represent effectively their clients in the states which have such residency requirements for admission.

Residency requirements do not address attorney competence. Instead, they are artificial barriers to practice which deter the provision of more cost effective legal services to those corporations that use inside counsel. Thus, this case is of significant interest to the members of ACCA.

JURISDICTION

The jurisdictional grounds are fully set forth in the Brief of the Appellant, Supreme Court of New Hampshire, and the Motion to Affirm filed by Appellee, Kathryn A. Piper, and need not be set forth here again in accordance with Rule 36.5 of this Court.

SUMMARY OF ARGUMENT

Although states have authority to regulate admissions to the bar and the practice of law within their boundaries, that right is not unfettered. Restrictions on practice must reasonably relate to determining fitness and capacity to practice. *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1947); *In re Griffiths*, 413 U.S. 717 (1973).

In the case at hand the State seeks to require residence as a prerequisite to admission to practice. Under *Hicklin v. Orbeck*, 437 U.S. 518 (1978), New Hampshire must demonstrate that nonresidents "constitute a peculiar source of evil" and that discrimination against nonresidents "bears a substantial relationship to the particular 'evil' they are said to present." *Id.* at 525-527. ACCA agrees with appellee that the State has not demonstrated a substantial relationship between residency requirements and fitness and capacity to practice law. Therefore, application of *Hicklin* requires that the requirements be struck down as violative of the Privileges and Immunities Clause (Article IV, Section 2, Clause 1 of the U.S. Constitution).

The appellee has fully briefed the issues surrounding violation of the Privileges and Immunities Clause. ACCA agrees with the reasoning set out by appellee and it is not ACCA's wish to repeat the arguments made by appellee and other *amici* supporting the appellee. Instead, ACCA wishes to emphasize to the Court that residency requirements have a particularly adverse effect

on ACCA's membership and their corporate clients. These attorneys have been engaged to develop expertise in their employers' legal problems and yet cannot be deployed fully because of the requirement for residency.

Most companies market their products or services in more than one state and, often, in many foreign countries. They need to be represented by lawyers who are familiar not only with the law of the jurisdiction but also with their particular organizations. Residency requirements present an artificial barrier to the effective utilization of legal services by companies with legal staffs that reside outside, but that transact business inside the State of New Hampshire. Residency requirements deny such companies the use of counsel of their choosing. This Court should not countenance artificial barriers to practice but should, in accordance with its line of prior decisions, support and encourage the effective competition and utilization of legal services.

ARGUMENT

I. RESIDENCY REQUIREMENTS BURDEN INTERSTATE COMMERCE BY IMPEDING EFFICIENT DELIVERY OF LEGAL SERVICES.

A. Many Corporations Have Created Corporate Law Departments to Provide More Efficient Delivery of Legal Services.

Recent years have seen a significant growth in the number of attorneys practicing law as employees of corporations, partnerships and other organizations in the private sector. Indeed, it has been estimated that such attorneys now make up between 10 and 15 per cent of the total practicing bar. In the recent edition of the *Directory of Corporate Counsel*, published by Law & Business, Inc./Harcourt Brace Jovanovich, Publishers (1984-1985), more than 25,000 attorneys employed by 5,000 organizations were listed.

Corporate lawyers working full time for corporations and other private sector organizations are the fastest growing segment of the legal profession. The growth of corporate law departments is based in part on the fact that corporate managers are realizing that handling legal problems by employing "in-house" attorneys can be more cost-effective than retaining counsel on a contractual basis. Because inside counsel are intimately familiar with the operations of their employers, they can provide more effective counseling and representation than an outside attorney unfamiliar with the company, who must be retained only because the legal problem has arisen in a state with a residency requirement.

As law departments of organizations have expanded, the technical and general legal problems that are handled by inside attorneys have also expanded. It is not unusual to find the vast majority, if not all, of the legal work of a corporation being performed by attorneys in the law department. The *Law & Business Directory of Corporate Counsel* lists 16 primary areas of practice for inside counsel and 140 sub-areas of specialization by inside counsel.

In a published study of 188 corporate law departments by Arthur Young & Company for the Association of the Bar of the City of New York, it was found that 31 percent of the manufacturing companies, 38 percent of the financial companies, and 45 percent of the non-manufacturing companies had all or a substantial part of their litigation performed by members of their legal staffs. *Survey of Corporate Law Departments' Practices, Report of Arthur Young & Company to the Association of the Bar of the City of New York* (December, 1983).

With the growth of the corporate law department, the need to hire local counsel in each jurisdiction in which a problem arises is diminished. Therefore, a requirement that an attorney be a resident before practicing law in

the state places a costly burden on the corporation which has already employed qualified counsel.

B. Residency Requirements for Admission to the Bar Impede the Efficient Delivery of Legal Services to Corporations That Use Inside Counsel.

The activities of lawyers play an important role in the conduct of commerce in the United States. Attempts to regulate the conduct of lawyers which interfere with the free flow of information to consumers of legal services have been struck down by this Court. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Residency requirements such as New Hampshire's also act as an artificial barrier to the cost-effective delivery of legal services and should, similarly, be struck down.

Most corporations and organizations which employ attorneys as full-time staff have operations ranging beyond the territorial limits of a single state. Corporations establishing law departments are usually engaged heavily in interstate commerce and involve themselves in transactions in numerous states. The inability of the corporate legal staff to practice and represent these corporations in the states in which they do business simply because of a residency requirement effectively denies the corporation effective legal counseling delivered in a cost-efficient fashion.

One could argue that admission *pro hac vice* for inside counsel would resolve such problems. However, not only is such admission subject to the discretion of the local court, but the implied threat of removal has been used as a Sword of Damocles over the attorney. It is not uncommon for an attorney, before being admitted *pro hac vice*, to be asked how many times he or she has sought such admission. The threat, sometimes implicit and occasionally explicit, is that such requests, if too frequent, will be denied.

Further, not all legal representation involves court appearances. Inside counsel represent corporations before state agencies, in administrative hearings, and in contract disputes. Some bar associations have suggested that the use of unadmitted inside counsel in such matters may be unauthorized practice of law. Further, it is not inconceivable that a question could be raised as to whether the advice given by the unadmitted attorney would be protected by the attorney-client privilege. In such jurisdictions, then, the only safe alternative is for the corporation to engage local counsel to work with its inside legal staff, thus creating economic waste, duplication of services, and increasd costs of doing interstate business.

Residency requirements place a particular burden on corporations located in multistate metropolitan areas such as Washington, D.C. or New York. As an example of the questions raised by a residency requirement, if a Washington, D.C. corporation were to move its corporate office to the Virginia suburbs, would its attorneys residing in Washington or Maryland and who were not members of the Virginia bar need to move to Virginia before those attorneys could continue to practice law for their corporate employer? [1]

Residency requirements are especially troublesome when a corporation is concerned with proliferation of similarly based causes of action brought in several states flowing from the same or similar product, such as an automobile, chemical or a drug. Handling such cases by as many counsel as there are jurisdictions with restrictive residency requirements leads to wasteful dissipation of assets. Efficiency in dispute resolution, as developed by experience, is beneficial for the courts, the client, and the client's adversaries.

---

[1] The Virginia residency requirement was recently overturned in *Giller v. Virginia Board of Bar Examiners*, C.A. 83-1282-A (E.D. Va. February 8, 1984), 52 U.S.L.W. 2505, *appeal pending*, No. 84-1250 (4th Cir.).

Counsel for ACCA is aware of various situations in which residency requirements present real problems for ACCA members. For example, some corporations, such as Sears, Roebuck and Co. ("Sears"), have established regional law offices in various sections of the United States. Sears' Eastern regional law office is located in St. Davids, Pennsylvania, a suburb of Philadelphia. That department is responsible for the regional affairs of Sears in seventeen eastern jurisdictions extending from Maine to South Carolina and as far west as Ohio, West Virginia and the eastern part of Kentucky. Since their offices are located in the Philadelphia metropolitan area, the attorneys working in that department reside in Pennsylvania. Residency requirements for admission to practice in states other than Pennsylvania have forced Sears to retain outside counsel in matters which could otherwise have been handled more efficiently and more economically by its own attorneys. There would seem to be no valid economic, legal or ethical reason for such a limitation on the practice of these lawyers, many of whom have extensive and successful trial and appellate experience not only in Pennsylvania and in other states, but also in a number of federal district and appellate courts including the Supreme Court of the United States itself.

Another company, Alcan Aluminum Corporation ("Alcan"), has its corporate headquarters in the State of Ohio, but the majority of Alcan's plants are in the State of New York. Alcan also happens to be incorporated in New York. New York State, until recently, had a residency requirement for admission to the New York state Bar, and the corporate legal staff of Alcan, which was domiciled in the State of Ohio, could not, without getting admitted *pro hac vice*, represent their company in the courts in the State of New York or generally practice law representing their company in New York.

A. M. Castle & Co., a mid-sized corporation with plants nationwide, has its corporate headquarters located in

Illinois, with a small legal staff. In order to satisfy its requirements for legal services, it is forced to hire outside counsel in a number of states in which it does business that have a residency requirement for admission to the bar. Such outside counsel unnecessarily duplicate the skills and knowledge necessary for effective representation of A. M. Castle.

The Budd Company, as a further example, is a Pennsylvania corporation, with its headquarters and legal staff in Michigan. Its products are used in millions of vehicles, in practically every state. It too has been forced, because of residency requirements, to hire outside local counsel to handle legal problems it otherwise would have handled with inside counsel.

The experiences of these corporations are not atypical. These companies and their experiences are representative of many other ACCA members. As we progress toward the twenty-first century, corporations are relying on sophisticated, complex and technology-oriented methods of manufacturing, production, and delivery of services. Also, the increased complexity of manufacturing, distribution, and doing business in general requires organizations and corporations that deal in interstate commerce to engage counsel who have an intimate and thorough knowledge of the product, and its technology.

Consequently, corporations have found it increasingly necessary to use their own inside counsel for representation to control the continually increasing costs of maintaining the necessary level of technical expertise of the attorneys that represent them. If those attorneys cannot represent corporations in various states simply because they do not reside there and, therefore, cannot gain admission to the bar, corporations effectively are forced to retrain and duplicate these services in every state in which they do business. This results in economic waste and the inefficient delivery of legal services.

The residency requirement is a barrier which burdens those who sell products, and otherwise transact business, in the State of New Hampshire, but who do not reside there. When such local interest conflicts with the national interest of having national markets without barriers, the local interest, if not clearly persuasive, should give way to the national. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977).

C. Residency Requirements Impose Anti-Competitive Restraints on the Practice of Law.

The real result of the New Hampshire residency requirement is to impose anti-competitive restrictions on the availability of legal services within the state. The residency requirement clearly should fall when compared with the national interest of national commerce and interstate relationships. *United Building and Construction Trades Council v. City of Camden*, —— U.S. ——, 104 S.Ct. 1020, 79 L.Ed.2d. 249 (1984); *Hunt v. Washington State Apple Advertising Commission, supra.* If the lower court's decision is not allowed to stand, corporations with inside counsel will incur increased costs flowing from duplication of professional services because they will be forced to hire local counsel to do work that otherwise would be performed by its own law department attorneys. The result will be to raise artificial barriers and reduce competition for the practice of law within the state.

Corporations, as well as individuals, should be free to select qualified, competent counsel to represent them as long as those counsel are subject to disciplinary sanctions imposed by the jurisdiction in which they are practicing (see page 12 *infra*). Business entities with inside counsel are sophisticated users of legal services that can well make their own decisions as to how to fill their requirements for legal counseling and representation. Those companies should not be restricted from making their

own judgments as to which attorneys to hire merely because a state has a residency requirement. Corporations should not have to concern themselves with whether or not the attorneys they chose to represent them can leap hurdles erected by the state to bar competent, qualified attorneys who do not happen to reside in the local jurisdiction. The corporate client is not served in any way and is indeed considerably harmed by a requirement forcing it to use attorneys who reside in the local jurisdiction. The residency requirement does not serve the interests of the client; instead, it is nothing short of a form of protectionism, which should not be condoned by this Court.

II. THERE IS NO LEGITIMATE STATE INTEREST TO PROTECT WHICH REQUIRES RESIDENCY FOR ADMISSION TO THE BAR.

Under *Hicklin*, the state must show that the residency requirement is needed to avoid the particular "evil" nonresidents would create.[9] In this case, attorney competency is not an issue since appellee has recently passed the bar examination. The only reason appellant has set forth to justify the requirement is the need for state control to maintain and ensure the professional conduct of attorneys practicing in the state. There are, however, many other

---

[9] The teaching of *Hicklin* was recently applied in *Giller v. Virginia Board of Bar Examiners*, C.A. 83-1282-A (E.D. Va. February 8, 1984), 52 U.S.L.W. 2540, *appeal pending*, No. 84-1259 (4th Cir.). The court, relying on *Hicklin*, invalidated Virginia's requirement that an applicant for admission be a "permanent resident" of the Commonwealth of Virginia, as a violation of the Privileges and Immunities Clause. The court held that nonresidents were not the source of the "evils" sought to be avoided, namely, a bar membership unfamiliar with local practice and customs and insufficiently scrutinized for proper character. The court also found that the means employed in the statute to protect against such "evils" were not well-tailored to accomplish the expressed goals.

less burdensome means for ensuring adequate state control to discipline attorneys without requiring residency.

It is axiomatic that a state may properly discipline attorneys who practice within its borders or who are admitted to its bar. A condition for being admitted *pro hac vice* is the willingness to submit to discipline by the admitting court. Likewise, attorneys admitted in a state remain subject to sanctions although practicing outside the state. The American Bar Association Model Rules of Professional Conduct adopted by the Full House of Delegates of the ABA on August 2, 1983, states in Rule 8.5, "Jurisdiction":

> A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.

The ABA, in adopting that rule, recognized that the practice of law is becoming less parochial. This was confirmed in the commentary to the rule which stated:

> In modern practice, lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice . . .

Thus, the Model Code recognizes the fact that a court may properly discipline an attorney admitted to practice before it, and that any admitted attorney remains subject to that court's jurisdiction, notwithstanding the attorney's residency or practice beyond the jurisdictional territorial limits of that court. The bar of any state, through its disciplining process, has the power to disbar and discipline those attorneys admitted to the bar if those attorneys do not conduct themselves in the required manner.

The State could also require a non-resident attorney admitted to practice in that state to designate an agent

for service of process. An example is Section 520.11 of Rules for Admission of the Court of Appeals of the State of New York which states:

> 520.11 Designation of agent for service of process.
>
> (a) Every applicant for admission to practice who does not reside and is not employed full-time in the State shall be required, as a condition of admission, to execute and file with the Appellate Division of the department in which the applicant is being admitted, a duly acknowledged instrument in writing setting forth the applicant's residence or mailing address and designating the clerk of such Appellate Division as the applicant's agent upon whom process may be served, with like effect as if served personally upon the applicant, in any action or proceeding thereafter brought against the applicant and arising out of or based upon any legal services rendered or offered to be rendered by the applicant within the State.

When a rule, such as a residency requirement for admission, has a discriminatory effect, the local interest must not only be justified, but no other alternative must be able to satisfy those interests. This Court has stated in *Hunt v. Washington State Apple Advertising Commission*, *supra*, at 353:

> . . . the burden falls on the State to justify it (the discriminatory statute) both in terms of local benefits flowing from the statute and the unavailability of non-discriminatory alternatives adequate to preserve the local interest at stake.

As shown above, there is no rational state interest in requiring residency for admission to the New Hampshire bar, since the legitimate interests in regulating the bar and administering discipline can be adequately accomplished by non-discriminatory alternatives.

CONCLUSION

The decision below, striking down residency requirements for admission to the practice of law in the State of New Hampshire, is in keeping with the modern practice of law and the promotion of effective competition of legal services. It allows individuals, corporations, and other organizations with inside legal staffs to utilize attorneys of their choice in the most cost-effective manner possible. Accordingly, *Amicus Curiae*, the American Corporate Counsel Association, respectfully prays that the decision of the Court below be upheld.

Dated this 30th day of July, 1984.

Respectfully submitted,

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BRIEF

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No. 83-1406

In The
Supreme Court of the United States
October Term, 1983

SUPREME COURT OF NEW HAMPSHIRE,
Appellant,

vs.

KATHRYN A. PIPER,
Appellee.

On Appeal From The United States Court of Appeals
For The First Circuit

APPELLEE'S BRIEF

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QUESTIONS PRESENTED BY THE APPEAL

1. Does it violate the Article IV Privileges and Immunities of nonresident applicants to the New Hampshire Bar to exclude them solely on account of their nonresidence, even if they intend to open up or join a law office in New Hampshire, where their place of home residence has no bearing on their fitness to practice law in New Hampshire?

2. Does the New Hampshire residency rule violate the Commerce Clause where it serves as a total bar to nonresident applicants joining the New Hampshire Bar and shields the New Hampshire Bar from outside competition even though there is no substantiated claim that the home residence of bar applicants raises any legitimate nonprotectionist state concerns?

3. Is it a violation of the right of equal protection for applicants to the New Hampshire Bar to be excluded from bar membership solely because of their home residence, even if they intend to set up or join an office in New Hampshire, when admitted attorneys are not required to maintain their New Hampshire residence or any other connection with the State?

TABLE OF CONTENTS

Pages

Questions Presented By The Appeal 1

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

Summary of Argument 2

Argument:

I. The New Hampshire residency rule is subject to scrutiny under the Privileges and Immunities Clause of Article IV 5

A. The Privileges and Immunities Clause protects against discrimination directed at nonresident attorneys and applicants to the bar. 5

B. The relation between the bar and the state judiciary is no cause for exempting the residency requirement from scrutiny under Article IV. 9

C. The discretion properly accorded state courts does not extend to court rules which infringe upon federal constitutional rights. 11

II. The New Hampshire residency rule violates the Privileges and Immunities Clause of Article IV because it excludes applicants to the bar on the sole basis of their home residency and is unrelated to the achievement of any substantial legitimate purpose. 16

A. The standard of review. 16

B. New Hampshire has failed to provide any legitimate substantial reason for its residency rule which is closely related to the actual terms of that rule. 20

1. The justifications advanced in support of the New Hampshire rule. 25

TABLE OF CONTENTS—Continued

Pages

a. Familiarity with local rules and procedures. 25

b. Exposure to unique New Hampshire problems. 26

c. Attorney's reputation. 27

d. Availability for court appearances and disciplinary proceedings. 28

e. Participation in *pro bono* activities. 29

f. Other justifications. 30

2. The New Hampshire residency rule bears no relation to the justifications advanced on its behalf. 32

III. The New Hampshire residency requirement is in violation of the Commerce Clause. 36

IV. Requiring residency for admission to the bar without imposing a continuing residency requirement upon practicing attorneys violates the right to equal protection of out-of-state applicants to the bar. 38

Conclusion 40

TABLE OF AUTHORITIES

Cases:

Austin v. New Hampshire, 420 U.S. 656 (1975) 17

Bacchus Imports, Ltd. v. Dias, 52 U.S.L.W. 4979 (1984) 8, 37

Baird v. State Bar of Arizona, 401 U.S. 1 (1971) 12, 39

Baldwin v. Montana Fish & Game Commission, 436 U.S. 371 (1978) 6, 10, 39

TABLE OF AUTHORITIES—Continued

	Pages
Bates v. State Bar of Arizona, 433 U.S. 350 (1977)	9, 12
Bernal v. Fainter, 104 S.Ct. 2312 (1984)	11, 20
Bliss's Petition, 63 NH 135 (1884)	27
Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873)	14
Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964)	12
Cabell v. Chavez-Salido, 454 U.S. 432 (1982)	19, 34
Chimento v. Stark, 353 F.Supp. 1211, *aff'd mem.*, 414 U.S. 802 (1973)	26
Cammer v. United States, 350 U.S. 399 (1956)	10
Doe v. Bolton, 410 U.S. 179 (1973)	7
Donnelly v. Manchester, 111 NH 50, 274 A.2d 789	27
Drociak v. Supreme Court of New Hampshire, No. 80-806 (N.H. 1980), *appeal dismissed and cert. denied*, 449 U.S. 1106 (1981)	15
Gilles v. Virginia Board of Bar Examiners, C.A. 83-1282-A. (E.D. Va. 1984), 52 U.S.L.W. 2505, *appeal pending*, No. 84-1259 (4th Cir.)	20
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)	9, 36
Gordon v. Committee on Character and Fitness, 48 N.Y.2d 266, 422 N.Y.S. 641, 397 N.E.2d 1309 (1979)	16, 20
Hicklin v. Orbeck, 437 U.S. 518 (1978)	9, 19, 20
Hughes v. Oklahoma, 441 U.S. 322 (1979)	36
Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1977)	34, 37
In re Griffiths, 413 U.S. 717 (1973)	3, 10, 11, 12, 18, 24, 30
In re Judd, 391 Mass. 227, 461 N.E.2d 760 (1984)	16, 20, 25, 28

TABLE OF AUTHORITIES—Continued

	Pages
In re Lockwood, 154 U.S. 116 (1894)	15
In re Primus, 436 U.S. 412 (1978)	12
In re R.M.J., 455 U.S. 191 (1982)	12, 18
In re Stolar, 401 U.S. 23 (1971)	12
Kassel v. Consolidated Freightways Corpe Corp., 450 U.S. 662 (1981)	37
Keenan v. Board of Law Examiners, 317 F.Supp. 1350 (E.D.N.C. 1970)	26
Konigsberg v. State Bar of California, 353 U.S. 252 (1957)	12, 13
Leis v. Flynt, 439 U.S. 438 (1979)	6, 14, 15, 39
Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980)	37
Mississippi University for Women v. Hogan, 458 U.S. 718 (1982)	15
N.A.A.C.P. v. Button, 371 U.S. 415 (1963)	12
Noll v. Alaska Bar Association, 649 P.2d 241 (Alaska 1982)	16, 20
Sargus v. West Virginia Board of Law Examiners, 294 S.E.2d 440 (W. Va. 1982)	16, 20, 25
Schware v. Board of Bar Examiners, 353 U.S. 232 (1957)	12, 13, 26
Sheley v. Alaska Bar Association, 620 P.2d 640 (Alaska 1980)	8, 16
South Central Timber Development, Inc. v. Wunnicke, 104 S.Ct. 2237 (1984)	36, 39
Stalland v. South Dakota Bar of Board Examiners, 330 F.Supp. 155 (D.S.D. 1982)	9, 20, 25
Stanley v. Illinois, 405 U.S. 645 (1972)	40

TABLE OF AUTHORITIES—Continued

	Page
State v. Lancaster, 63 NH 267 (1884)	27
State v. Pennoyer, 65 NH 113 (1889)	27
Strauss v. Alabama State Bar, 520 F.Supp. 173 (N.D. Ala. 1981)	9, 20
Toomer v. Witsell, 334 U.S. 385 (1948)	6, 7, 9, 17, 19, 20, 25
United Building and Construction Trades Council of Camden v. Mayor and Council of Camden, 104 S.Ct. 1020 (1984)	3, 4, 5, 6, 7, 10, 16, 17, 21
United Mine Workers v. Illinois State Bar Association, 389 U.S. 217 (1967)	12
United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971)	12
Warren K. Vautine Studio, Inc. v. Portsmouth, 93 NH 171, 59 A.2d 475 (1948)	27
Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963)	12
Wilson v. Wilson, 416 F.Supp. 984 (D.Or. 1976), *aff'd mem.*, 430 U.S. 925 (1977)	15
Zobel v. Williams, 457 U.S 55 (1982)	19

COURT RULES AND STATUTES:

New Hampshire Supreme Court Rule 33(1)	7
New Hampshire Supreme Court Rule 37(1) (a)	28
New Hampshire Supreme Court Rules 42(1), (5), (7)	23
Superior Court Rule 19	7
N.H. Rev. Stat. Ann. 11:6 (1983)	20
N.H. Rev. Stat. Ann. 21:6 (1983)	2
N.H. Rev. Stat. Ann. 310:4 (1983)	28

TABLE OF AUTHORITIES—Continued

	Page
CONSTITUTIONS:	
Commerce Clause, Article I, Section 8, U.S. Constitution	7-8, 33, 36-37
Due Process Clause, Fourteenth Amendment, U.S. Constitution	12
Equal Protection Clause, Fourteenth Amendment, U.S. Constitution	10-11, 12, 18, 28-40
First Amendment, U.S. Constitution	12
Privileges and Immunities Clause, Article IV, Section 2, U.S. Constitution	*passim*
Privileges and Immunities Clause, Fourteenth Amendment, U.S. Constitution	15
MISCELLANEOUS:	
Hafter, "Toward the Multi-State Practice of Law Through Admission by Reciprocity," 53 Miss. L.J. 1 (1983)	23
Hurwitz, "'Trade Barriers' to Bar Admission," 28 J.Am. Judicature Soc. 102 (1944)	8
Note, "A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV," 92 Harv. L. Rev. 1461 (1979)	9, 33
Smith, "Time for the National Practice of Law Act," 64 A.B.A.J. 557 (1978)	8
2 Records of the Bar of the County of Grafton (1890-91)	13

STATEMENT OF THE CASE

Appellee, Kathryn A. Piper, a member of the Vermont Bar, resides with her husband and children in the State of Vermont, less than 400 yards from the New Hampshire state line. Joint Appendix ("J.A."), p. 25. In 1979 she applied for permission to sit for the February 1980 session of the New Hampshire Bar examination. J.A. pp. 25, 43-57. After investigation, the New Hampshire Board of Bar Examiners found her to be of good moral character and approved her request. J.A. pp. 25-26. She took the exam and was notified on April 18, 1980, that she had received a passing grade and would be eligible for admission to the bar upon establishing a home residence in New Hampshire. J.A. pp. 11-12, 26. At the time she applied to take the exam, she signed in good faith a statement of intent to establish a residence in New Hampshire. J.A. pp. 26, 43. Because of her personal and family circumstances, however, it became infeasible for her to move her residence to New Hampshire. J.A. pp. 12-14, 26.

On May 7, 1980, Ms. Piper wrote to the Clerk of the New Hampshire Supreme Court stating the reasons for her inability to move her residence and requesting an exception from the residency requirement. J.A. pp. 12-14, 26. In that letter she stated that if admitted she had a possible job with an attorney in Littleton, New Hampshire. J.A. p. 14. Her request for an exception was denied, J.A. pp. 14-15, 26, as was her subsequent petition to the New Hampshire Supreme Court. J.A. pp. 15-16, 27. At no time during the application and appeal process did the New Hampshire Board of Bar Examiners or the New Hampshire Supreme Court question Ms. Piper's character, fitness or competence for the practice of law. J.A. p. 27. The sole bar to her entry has been the several hundred yards between her residence and the New Hampshire border.

The New Hampshire residency requirement for admission to the bar is stated in New Hampshire Supreme Court Rule 42(3) which provides that "[a]ny person domiciled in the United States and who either is a resident of the State of New Hampshire or files a statement of intention to reside in the State of New Hampshire shall be eligible to apply for examination provided he is of the qualifications hereinafter provided." Although the Supreme Court Rules do not define "residency", the Chief Justice has defined it to mean "that an applicant intends that the State of New Hampshire will be his or her '[p]rincipal place of physical presence for the indefinite future to the exclusion of all others.'" [quoting from N.H. Rev. Stat. Ann. 21:6 (1983)]. J.A. p. 33. Residency is also defined in the Supreme Court's petition and questionnaire for admission to the Bar of New Hampshire as meaning "domiciled in New Hampshire." J.A. pp. 38-39, 45. According to the affidavit of the Clerk of the Supreme Court, residency must either be established at the time of application for admission or prior to the administration of the oath of admission. J.A. pp. 36-38.

New Hampshire does not have a continuing residence requirement. Ms. Piper presented documentation to the district court that as of April 1982, 209 members of the New Hampshire Bar listed business addresses outside of the state, principally in adjacent states but also in such distant locales as Hawaii and the Virgin Islands. J.A. pp. 29-31.

SUMMARY OF ARGUMENT

The New Hampshire residency requirement violates the explicit language of the Privileges and Immunities Clause of Article IV by making the fact of out-of-state residency an absolute barrier to bar admission.

Ia. The claim that the residency requirement should be exempt from constitutional review is wholly inconsistent with the central focus of the Privileges and Immunities Clause upon the protection of out-of-state citizens from discrimination in pursuing their livelihoods. *United Building and Construction Trades Council of Camden v. Mayor and Council of Camden*, 104 S.Ct. 1020, 1028 (1984).

Ib. The argument that bar regulations should be exempt from review because of their noncommercial aspect falsely assumes that the Privileges and Immunities Clause is limited to purely economic concerns and fails to acknowledge the commercial aspect of the legal profession and the pronounced economic effects of barriers to admission.

Ic. The claim that bar admission standards should be exempt from review because of the close relation between the bar and the judiciary goes well beyond the scope of the "government function" exception as defined by this Court. This Court has already rejected the same type of argument when it was made by the State of Connecticut in an attempt to insulate its rule preventing the admission of aliens to its bar from review under the Equal Protection Clause. *In re Griffiths*, 413 U.S. 717 (1973).

Id. Although this Court has recognized that state courts should have discretion in state bar regulation, it has never permitted this discrimination to be used to justify the violation of a federal constitutional right. The claim that upholding the district court decision would threaten a wide range of other bar rules is erroneous because the New Hampshire residency requirement is qualitatively different in its exclusive basis upon the criterion of state residence and in its failure to have any relation to its stated purposes.

2a. Under the Privileges and Immunities Clause, it is incumbent upon the State to demonstrate that there is a "substantial reason" for the discrimination, that out-of-staters are a "peculiar source" of the evil at which the discrimination is aimed and that there is a "close relation" between the degree of discrimination and the justifications offered on its behalf. *United Building and Construction Trades Council of Camden v. Mayor and Council of Camden*, 104 S.Ct. 1020, 1029-30 (1984) Although this standard permits the States leeway in analyzing local evils, this Court has not deviated from this standard nor adopted the much-diluted "reasonable basis" standard proposed by the New Hampshire Supreme Court ("New Hampshire") and utilized in the dissenting opinion below.

2b. The purported justifications for the New Hampshire residency requirement are questionable on their own terms and completely unrelated to the actual provisions of the rule. The rule only covers out-of-state applicants to the bar, not admitted attorneys, and bars all out-of-state applicants unable or unwilling to shift their residence to New Hampshire, even those who intend like Ms. Piper to set up or join a law office in New Hampshire. By way of contrast, the justifications for the rule all relate to problems that would allegedly be created by admitted attorneys who principally practice out-of-state. Thus, the category of persons actually affected by the rule is totally different than the category which New Hampshire cites as the "peculiar source" of the evil it claims to be addressing. Furthermore, each goal cited by New Hampshire could be far more directly promoted by other measures which would have little or no discriminatory impact.

3. The New Hampshire residency rule also violates the Commerce Clause because its protection of the local

bar at the expense of potential out-of-state competitors creates a significant impediment to interstate commerce both in terms of legal practice and other forms of business requiring legal work without achieving any legitimate non-protectionist purposes.

4. The New Hampshire residency rule also violates the right of equal protection of out-of-state bar applicants as contrasted to the category of admitted attorneys. There is no rational basis for excluding all out-of-state resident applicants, even those who intend to set up or join a law office in New Hampshire, yet permitting admitted attorneys to maintain their bar membership even after severing all other connections with the State.

ARGUMENT

I. The New Hampshire residency rule is subject to scrutiny under the Privileges and Immunities Clause of Article IV.

The threshold question raised by this appeal is whether the opportunity to practice law is protected by the Privileges and Immunities Clause of Article IV. The district court and both panels of the court of appeals held that it was.

A. The Privileges and Immunities Clause protects against discrimination directed at nonresident attorneys and applicants to the bar.

New Hampshire's claim that its bar residency rule is not covered by the Privileges and Immunities Clause is squarely at odds with the repeated statements of this Court that employment-related barriers or preferences based upon state of residence are at the very core of the Clause's coverage. Most recently, in *United Building and Construction Trades Council of Camden v. Mayor and Council of Camden*, 104 S.Ct. 1020, 1028 (1984), this Court re-

affirmed that "[s]urely, the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause. . . . Many, if not most, of our cases expounding the Privileges and Immunities Clause have dealt with this basic and essential activity." (citations omitted). This was also a central conclusion in *Baldwin v. Montana Fish & Game Commission*, 436 U.S. 371, 388 (1978), where this Court used the question of whether the discrimination at issue detracted from the nonresident's right to pursue a livelihood as a test for determining whether it was encompassed by the Clause.

There can be no question that the New Hampshire residency rule meets this test. Relative to other employment discriminations considered by this Court under the Privileges and Immunities Clause, the New Hampshire residency rule is more drastic because instead of just increasing the licensing fee for out-of-state residents, *e.g., Toomer v. Witsell*, 334 U.S. 385 (1948), or providing a preference to in-state residents, *e.g., United Building and Construction Trades*, 104 S.Ct. 1020, the rule prohibits out-of-staters altogether. It operates as a total bar upon Mr. Piper's ability to earn a livelihood within the State of New Hampshire through her chosen profession. For some out-of-state residents wishing to practice in New Hampshire, especially those without dependents, it may be feasible to circumvent the requirement by establishing an in-state domicile. But for many, especially those with families and careers employed out-of-state, meeting the residency requirement would cause great hardship or be impossible altogether. New Hampshire points to the alternative of being admitted *pro hac vice* to any individual cases. But there is no right to *pro hac vice* admission, *Leis v. Flynt*, 439 U.S. 438 (1979), and even when granted, it does not suffice for the out-of-state attorney who wishes

to practice in-state on a regular basis. Further, it is an expensive procedure for the client because state court rules require that a member of the New Hampshire Bar also be in attendance at any trial or hearing in which a specially admitted attorney is engaged.[1]

New Hampshire attempts to distinguish the bar residency rule from other types of employment barriers on the ground that it is not based upon economic factors. However, this Court has never restricted the coverage of the Privileges and Immunities Clause to economic regulation. Rather, according to this Court's classic formulation, the Clause was designed "to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1947). Thus, in *Doe v. Bolton*, 410 U.S. 179, 200 (1973), this Court held that the Clause prohibited a state from excluding out-of-state residents from abortion services. Under New Hampshire's analysis, the Privileges and Immunities Clause becomes virtually redundant with the Commerce Clause. However, this Court has made clear that "[t]he two Clauses have different aims and set different standards for state conduct." *United Building and Construction Trades Council*, 104 S.Ct. 1020, 1028. What triggers coverage under the Clause, is not just economic protectionism but "discrimination against out-

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1. New Hampshire Supreme Court Rule 33(I) provides that "[a] lawyer who is not a member of the bar of this State shall not be permitted to enter an appearance in any case except on motion that may be granted if a member of the bar of this State is associated with him and is present at oral argument."

Superior Court Rule 19 provides that "[a]n attorney who is not a member of the Bar of this State, shall not be allowed to engage in the trial or hearing in any case, except on motion, which will not ordinarily be granted unless a member of the Bar of this State is associated with him and present at the trial or hearing."

of state residents on matters of fundamental concern. . . ." *Id.*

Even were New Hampshire correct that the scope of the Privileges and Immunities Clause should be limited to that of the Commerce Clause, its argument would still fail because this Court has made clear that the latter applies where there is a discriminatory economic effect even in the absence of a discriminatory purpose. *E.g., Hughes Tool Co. v. Fawcus Machine Co.*, 52 U.S.L.W. 4979, 4981 (June 29, 1984). Whatever the motivation behind the New Hampshire residency rule, there can be no question as to its discriminatory economic impact.[2] Not only does it exclude a whole class of attorneys from practicing in New Hampshire, but it also benefits in-state attorneys by protecting them from potential competition.[3] It was noted forty years ago by the then-dean of the Duke University Law School that "an examination of requirements for admission to the bar shows a distinct leaning toward the protection of the local student and the local lawyer with much the same effect as is created by ordinary trade barriers." Horack, "'Trade Barriers' to Bar Admission," 28 J.Am. Judicature Soc. 102 (1944). Although the specifics of admission requirements have changed over the years, residency requirements still embody this tendency. *Sheley v. Alaska Bar Ass'n*, 639 P.2d 640, 646 (Alaska 1982);

2. Although it is not necessary to establish a protectionist interest, it should be noted that a former President of the American Bar Association has acknowledged that "many of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition." Smith, "Time for the National Practice of Law Act," 64 A.B.A.J. 357 (1978).

3. The specific economic impact of the New Hampshire residency rule on out-of-state attorneys and clients wishing to retain out-of-state attorneys is detailed in the amicus briefs filed on behalf of Ms. Piper.

Strauss v. Alabama State Bar, 520 F.Supp. 173, 178 (N.D. Ala. 1981). *See* Note, "A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV," 92 Harv. L. Rev. 1461, 1470-76 (1979).

New Hampshire's position entirely disregards the commercial aspect of lawyering. This Court has expressly rejected the claim that lawyers are "somehow above trade," *Bates v. State Bar of Arizona*, 433 U.S. 350, 371-72 (1977), and has pointed out that "in the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse. . . ." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975). A restriction on the availability of legal services has a ripple effect across virtually every sector of the economy.

New Hampshire's claim that its residency rule is not contrary to the promotion of interstate harmony is plainly wrong. *See Stalland v. South Dakota Board of Bar Examiners*, 530 F.Supp. 155, 158 n. 5 (D.S.D. 1982). It tends to make each state an island unto itself and turns state borders into barriers instead of passageways. If, as this Court has held, residency restrictions on such occupations as shrimp-trawling, *Toomer v. Witsell*, 334 U.S. 385 (1948), and oil pipeline workers, *Hicklin v. Orbeck*, 437 U.S. 518 (1978), detract from interstate harmony, it is inconceivable that a residency requirement for bar admission does not have the same effect.

B. The relation between the bar and the state judiciary is no cause for exempting the residency requirement from scrutiny under Article IV.

Additionally, New Hampshire argues that the residency rule should be exempted from constitutional review because of the close relation between the bar and the judiciary. This Court, however, has almost uniformly rejected

efforts to establish exceptions from the coverage of the Clause with respect to matters of fundamental importance. *See, e.g., United Building and Construction Trades*, 104 S.Ct. 1020 (no exception for public employment); *Baldwin v. Montana Fish & Game Commission*, 436 U.S. 371 (no exception for state wildlife or other natural resources).

New Hampshire's claim is a version of the "political function" argument which this Court has already ruled does not apply to the private bar. *In re Griffiths*, 413 U.S. 717 (1973) (alien cannot be barred from admission to the Connecticut Bar because of her lack of American citizenship). In *Griffiths* the Connecticut Supreme Court also attempted to use the special position and responsibility of attorneys as grounds for exempting its rule barring aliens from scrutiny under the Equal Protection Clause. In rejecting that claim, this Court noted that:

> Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts. . . . Yet, they are not officials of government by virtue of being lawyers. Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of governmental policy. *Id.* at 729.

This Court also quoted from its prior opinion in *Cammer v. United States*, 350 U.S. 399, 405 (1956), that:

> Certainly nothing that was said in *Ex parte Garland* or any other case decided by this Court places attorneys in the same category as marshalls, bailiffs, court clerks or judges. Unlike these officials, a lawyer is engaged in a private profession, important though it may be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business. The word "officer" as it has always been applied to lawyers conveys a different meaning from the word

> "officer" as applied to people serving as officers within the conventional meaning of that term. *Id.* at 728-729.

Last term this Court reaffirmed its holding in *Griffiths* in the case of *Bernal v. Fainter* in which it ruled that it was a violation of equal protection to deny aliens the opportunity to become notaries. 104 S.Ct. 2312 (1982). Like the New Hampshire Supreme Court here, the State of Texas relied on the power of notaries to authenticate written instruments, administer oaths and take out-of-court depositions as grounds for claiming exemption from constitutional review. However, the Court emphasized that "the political-function exception must be narrowly construed," *Id.* at 2317 n. 7, and must be limited to positions where "the officeholder would necessarily exercise broad discretionary power over the formulation or execution of public policies importantly affecting the citizen population. . . ." *Id.* at 2318. It is self-evident that the private practice of law does not fall within this category.

In an attempt to avoid the reach of the *Griffiths* opinion, New Hampshire argues that it is claiming exemption based upon the lawyer's role as user of state power rather than as formulator of policy. Brief at 16. But insofar as it is possible to distinguish between these roles, this Court considered both of them in its *Griffiths* opinion. New Hampshire also attempts to distinguish *Griffiths* on the ground that it involved the Equal Protection Clause, but it has failed to advance any reason why restrictions on attorneys should be covered under the one constitutional guarantee but not under the other.

C. The discretion properly accorded state courts does not extend to court rules which infringe upon federal constitutional rights.

New Hampshire repeatedly cites the principles that control of the bar of each state is vested in the court of

that state and that federal courts should defer to the state court's right of regulation. This Court, however, has made clear that its deference extends only so long as the action of the state court does impinge upon federal constitutional rights. *E.g., In re Primus*, 436 U.S. 412, 440 (Rehnquist, J., dissenting) (1978). As Justice Black wrote for this Court in the *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 6 (1964), "Virginia undoubtedly has broad powers to regulate the practice of law within its borders; but we have had occasion in the past to recognize that in regulating the practice of law a State cannot ignore the rights of individuals secured by the Constitution." In addition to the right to equal protection, this Court has also protected first amendment[4] and due process[5] rights against violations by state bar admission and disciplinary rules. In none of these decisions has the Court disparaged the importance of the legal profession nor the responsibility and discretion of state courts in regulating it. But these factors have never been held sufficient to preempt constitutional review.

The claim for deference is much weaker here than in many of the decided cases because Mr. Piper is raising the type of generalized constitutional issue that has always been considered particularly appropriate for this Court's determination rather than challenging an individualized factual determination as was done in cases such as *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), and *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957). This case does not implicate the competence or discretion of the New Hampshire Supreme Court but only seeks to adhere its general requirements for bar admission to the provisions of the Constitution.

It should also be emphasized that the district court's ruling does not in any way affect the New Hampshire Supreme Court's right to regulate state court procedures or practice. Its order has no effect upon the substantive practice of law in New Hampshire courts nor upon the rules regulating admitted attorneys. The relief ordered leaves untouched all the prerogatives of the New Hampshire Supreme Court except for the enforcement of the residency rule against bar applicants.[6]

New Hampshire argues that a ruling in favor of Mr. Piper will open the way to additional challenges under the Privileges and Immunities Clause to other rules which may be more central to its regulation of the bar. This concern is not well-founded. In contrast to all the other regulations cited by New Hampshire, the residency requirement is qualitatively different inasmuch as it is

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4. *In re R.M.J.*, 455 U.S. 191 (1982); *In re Primus*, 436 U.S. 412 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *In re Stolar*, 401 U.S. 23 (1971); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971); *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

5. *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957); *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963).

6. The amicus brief filed by the State of Virginia and a host of other states places special emphasis on the lengthy history of residency rules. Brief at 4-5. But at least in New Hampshire the rule appears to be of comparatively recent origin. It is first stated in Rule 15 of the Rules of the Supreme Court adopted in 1952. 97 N.H. 611, 613. The prior set of court rules adopted between 1949 and 1951 only require in-state residence for attorneys admitted by motion. 96 N.H. 587, 589-590. The earliest published county bar records in New Hampshire indicate that admission of attorneys from other states was permitted by bar rules and was fairly common. 2 Records of the Bar of the County of Grafton (1890-91) (reprinting records from 1788-1838), 187, 195, 210-11, 213, 217, 219, 239-40, 250, 253-54, 258, 260.

squarely and solely premised upon the classification of state residency and is lacking in any relation to an attorney's competence or responsibilities. By way of contrast, the other requirements cited by New Hampshire such as passage of an examination upon local law and agreement to perform *pro bono* work do not create a classification based upon state of residence and directly serve substantial goals that would likely meet the test under any constitutional standard. Thus, New Hampshire's claim that abolition of a residency requirement would be tantamount to the establishment of a national bar does not properly take into account the many other legitimate prerequisites to state bar admission which are not under challenge and which will continue to remain within the control of state authorities.

In support of its argument against review, New Hampshire cites this Court's opinions in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873), and *Leis v. Flynt*, 439 U.S. 438 (1979). However, when closely examined, neither case supports its position. In the *Bradwell* case, a female bar applicant residing in Illinois was denied admission to the Illinois Bar, apparently because of her sex. Because she was an in-state resident, and because there was no evidence that the State treated nonresident applicants any differently than residents, she could not invoke the Privileges and Immunities Clause of Article IV. Instead, she unsuccessfully relied on the Privileges and Immunities Clause of the Fourteenth Amendment. This Court did not hold that her rejection was exempt from constitutional review, but concluded that she did not state a claim under the Fourteenth Amendment because that Clause only protects the rights of United States citizenship and that citizenship is not a prerequisite to admission to the bar. *Id.* 138-139. Thus, even were the

opinion still good law, *see Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 n. 10 (1982), it has no pertinence to the claim being made in this case under Article IV.[7]

Similarly, in its opinion in *Leis v. Flynt*, 439 U.S. 438 (1979), this Court did not deny that bar regulations were subject to constitutional review but held that there was no constitutional right to appear before a state court without first being admitted to the bar of that state. In contrast to the attorney in that case, Ms. Piper has passed every requirement for admission to the New Hampshire Bar except residency. Her claim is not based upon a generalized assertion of the right to practice law, but upon the specific language of Article IV.

New Hampshire also cites this Court's refusal to reverse past decisions upholding residency requirements. But it should be noted that these challenges have generally depended upon factual issues relative to the individual applicant and have not squarely raised the privileges and immunities claim under Article IV. For example, in *Brockish v. Supreme Court of New Hampshire*, No. 80-806 (N.H. May 22, 1980), *appeal dismissed and cert. denied*, 449 U.S. 1106 (1981), New Hampshire persuasively argued that it was not necessary to reach the residency issue because of the lengthy passage of time between when the applicant took the bar and when he sought admission. Similarly, in the case of *Wilson v. Wilson*, 416 F.Supp. 984 (Mass. 1976), *aff'd mem.*, 430 U.S. 925 (1977), this Court affirmed the holding of the

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7. In this Court's subsequent opinion in *In re Lockwood*, 154 U.S. 116 (1894), the applicant alleged that her exclusion from the Virginia Bar violated her right to privileges and immunities under Article IV, but she failed to state whether she was a resident of Virginia and did not allege that that State treated in-state female applicants any differently than those from out-of-state.

lower court that the applicant did not have standing to contest the residency requirement.

The claim that applying the Privileges and Immunities Clause to state bar admission standards is an improper infringement upon the discretion of state courts has been uniformly rejected by those state courts which have heard this challenge in an adversarial context in recent years. By unanimous decisions, the highest state courts in Alaska[8], Massachusetts[9], New York[10] and West Virginia[11] have all held that residency requirements for admission to the bar violate the Privileges and Immunities Clause of Article IV. None of these state courts renounced their authority or responsibility to regulate the state bar, but they recognized that that responsibility did not render inapplicable basic federal constitutional guarantees.

II. The New Hampshire residency rule violates the Privileges and Immunities Clause of Article IV because it excludes applicants to the bar on the sole basis of their home residency and is unrelated to the achievement of any substantial legitimate purpose.

A. The standard of review.

As stated most recently by this Court, in *United Building Construction Trades Council of Camden v. Mayor and Council of Camden*, 104 S.Ct. 1020, 1029-30 (1984), to justify discrimination under the Privileges and Immunities Clause, the State must establish the existence of a "substantial reason" and as part of this justification show that nonresidents "constitute a peculiar source

8. *Noll v. Alaska Bar Association*, 649 P.2d 241 (Alaska 1982); *Shelov v. Alaska Bar Association*, 620 P.2d 640 (Alaska 1980).

9. *In re Judd*, 391 Mass. 227, 461 N.E.2d 760 (1984).

10. *Gordon v. Committee on Character and Fitness*, 48 N.Y.2d 266, 422 N.Y.S. 641, 397 N.E.2d 1309 (1979).

11. *Sargus v. West Virginia Board of Law Examiners*, 294 S.E.2d 449 (1982).

of evil at which the discrimination is aimed.'" [Quoting from *Toomer v. Witsell*, 334 U.S. 385, 396, 398 (1948)]. Furthermore, there must be a showing that "the degree of discrimination bears a close relation" to the reasons presented as justifications. *Id.*

New Hampshire's attempt to dilute this standard of review to a "reasonable basis" test is inconsistent with the entire body of law decided by this Court under the Privileges and Immunities Clause and with those cases relative to bar admission and disciplinary procedures decided by this Court under other constitutional provisions. Although prior challenges brought under the Privileges and Immunities Clause have addressed a wide variety of subjects normally left to the discretion of the States and their courts, this Court has consistently rejected the invitation to depart from a uniform standard of review.

For example, in *Austin v. New Hampshire*, 420 U.S. 656, 661-662 (1975) (holding unconstitutional a commuter tax imposed solely on nonresidents), this Court acknowledged that:

> "in taxation even more than other fields, legislatures possess the greatest freedom in classification" *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). Our review of tax classifications has generally been consonantly narrow therefore, to fit the broad discretion vested in the state legislatures.

Nevertheless, it held that because the taxpayers' challenge was based upon the Privileges and Immunities Clause, it had a special obligation to impose "a substantially more rigorous" standard of review in order to protect the integrity of the Privileges and Immunities Clause. Id. at 662. Similarly, in *Toomer v. Witsell*, 334 U.S. 385 (1948), this Court did not adopt a more relaxed standard of review although the discriminatory statute related to the state's special interest in preserving its

natural resources. Most recently, in the *United Building* case, 104 S.Ct. 1020 this Court reaffirmed the standard of review developed in its prior cases even though the discrimination under challenge related solely to employment on projects funded by public monies where the city had an acknowledged vital interest.

In cases involving challenges under other constitutional provisions to bar regulations and admission standards, this Court has also consistently followed the existing standard of constitutional review for the right at issue. *See, e.g., In re Griffiths*, 413 U.S. 717 (1973) (strict scrutiny applied under Equal Protection Clause to exclusion of aliens from the bar); *In re R.M.J.*, 455 U.S. 191 (1982) (commercial speech standards under First Amendment applied to lawyer advertising). New Hampshire has failed to cite a single case where this Court has modified its established standard of constitutional review because state regulation of the legal profession was at issue. In its initial decision in this case, the majority of the First Circuit panel adopted a reasonable relationship test to measure the constitutionality of the residency rule. 723 F.2d 98 (1983), Jurisdictional Statement ("J.S."), p. 24a. However, that opinion was subsequently withdrawn and after hearing the case *en banc*, even the panel that voted to reverse the district court's decision purported to apply the standard of review developed by this Court. 723 F.2d 110, J.S. pp. 1a, 14a.

To adopt the standard proposed by New Hampshire of "reasonable basis" would make the constitutional protections extended by the Privileges and Immunities Clause meaningless and do injury to the critical values that the Clause is intended to protect. It is so vague and amorphous as neither to provide any guidance as to what the law is nor to offer any real standard of review. By contrast, the requirement of "substantiality" established by this Court sets a specific standard and makes clear that the justification offered must be of significance in order to outweigh the constitutional rights of those discriminated against. The requirement that the out-of-state group discriminated against must be a "peculiar source of evil" is also important because it provides some protection against the singling out of outside groups for protectionist reasons.

New Hampshire's proposed test entirely fails to specify what relation if any is necessary between means and end. This omission is critical. The "close relation test" formulated by this Court is vital because it provides some assurance that the justification provided by the state is not just a rationalization but really is the basis of the discrimination. As this Court noted in *Cabell v. Chavez-Salido*, 454 U.S. 432, 440 (1982), "a classification test is also critical because it harmonizes the tends to undercut the governmental claim that the classification serves legitimate political ends." The close relation test is also critical because it harmonizes the competing claims by permitting the state to achieve its legitimate objectives without unnecessarily infringing upon the rights of out-of-staters. The failure to establish a close fit between the purported justification and the discrimination at issue has frequently been a major factor in this Court's analysis. *See, e.g., Toomer v. Witsell*, 334 U.S. 385, 398-99 (1948); *Hicklin v. Orbeck*, 437 U.S. 518, 527-28 (1978). *See also, Zobel v. Williams*, 457 U.S. 55, 71 (1982) (O'Connor, J., concurring).

Finally, it should be noted that the existing standard of review already gives adequate weight to the State's special concerns and adheres to the principle "that the States should have considerable leeway in

analyzing local evils and in preserving appropriate curse." *Toomer v. Witsell*, 334 U.S. at 396. The difficulty is not that the standard for review does not provide for special consideration of "local evils" but that New Hampshire has entirely failed to provide any evidence of any local problem that might justify a residency requirement.

B. New Hampshire has failed to provide any legitimate substantial reason for its residency rule which is closely related to the actual terms of that rule.

Every court which has applied the standard of review contained in *Hicklin v. Orbeck*, 437 U.S. 518 (1978), to bar residency requirements has concluded that they are unconstitutional. This includes the highest state courts in four states[12] and four district courts.[13] Although some of these cases have involved durational residency requirements which required the establishment of residency for a specified period of time prior to the taking of the bar exam, each court has made it clear that it was the residency requirement itself rather than its durational aspect which was constitutionally offensive. *E.g., Stalland v. South Dakota Board of Bar Examiners*, 530 F.Supp. 155, 161 (D.S.D. 1982).

In this action, the district court held a hearing on Mr. Piper's motion for summary judgment but New Hampshire

12. *In re Judd*, 391 Mass. 227, 461 N.E.2d 760 (1984); *Noll v. Alaska Bar Association*, 649 P.2d 241 (Alaska 1982); *Sargus v. West Virginia Board of Law Examiners*, 294 S.E.2d 440 (W.Va. 1982); *Gordon v. Committee on Character and Fitness*, 48 N.Y. 2d 266, 422 N.Y.S. 641, 397 N.E.2d 1309 (1979).

13. *Gilber v. Virginia Board of Bar Examiners*, C.A. 83-1282-A (E.D. Va. Feb. 8, 1984), 52 U.S.L.W. 2505, *appeal pending*, no. 84-1259 (4th Cir.); *Stalland v. South Dakota Bar at Board Examiners*, 530 F.Supp. 155 (D.S.D. 1982); Strauss v. Alabama State Bar, 520 F.Supp. 171 (N.D. Ala. 1981). The same conclusion was reached by the district court in this action. 539 F.Supp. 1064 (1982).

chose not to present any evidence aside from conclusory affidavits from the Chief Justice and Clerk of Court and attached exhibits relating to Mr. Piper's application. The affidavit of the Chief Justice stated the purposes of the residency requirement. It did not allege, however, except by inference, any "peculiar evil" resulting from out-of-state applicants nor did it attempt to establish a relationship between the actual provisions of the rule and the interests asserted. *J.A.* pp. 32-34.

The district court judge in this action, who had served for 16 years as a trial judge in New Hampshire's state courts, 539 F.Supp. at 1074, *J.S.* p. 69a, reviewed each of New Hampshire's justifications and concluded, that even after granting full deference to New Hampshire's discretion in regulating legal practice, that none of them were sufficient because there was no showing that out-of-state lawyers were a peculiar source of the evil nor that the residency requirement had a substantial relation to the justifications given.

In its initial opinion the First Circuit by a 2-1 decision upheld the residency rule but only on the basis of a "reasonable relationship" standard of review. 723 F.2d 99 (1983), *J.S.* p. 24a. Upon rehearing en banc, Judges Bownes and Coffin voted to uphold the finding of the district court. 723 F.2d 110 (1983), *J.S.* p. 2a.

Judges Bloyer and Campbell also acknowledging that "the issue is difficult," *Id.* at 120, *J.S.* p. 19a, concluded that the district court erred. However, it is clear that their opinion failed to apply the standards set forth by this Court in *United Building and Construction Trades Council of Camden v. Mayor and City Council of Camden*, 104 S.Ct. 1020 (1984). Instead, they continue to employ the same "reasonable relationship" test used in their prior opinion although the explicit articulation of a lower stand-

and is dropped. And rather than just evaluating the reasons proffered by New Hampshire, their opinion relies upon a justification of their own creation that "[t]he state might reasonably fear that the complete abolition of residency requirements would mean large firms in distant states would exert significant influence upon the decision, practices and makeup of the New Hampshire Bar." *Id.* at 119, *J.S.* p. 17a.

In evaluating the adequacy of the justifications provided for the New Hampshire residency rule, it is important to keep in mind the actual provisions of the rule and those of its characteristics in particular. First, it applies only to out-of-state applicants to the bar and not to attorneys already admitted. Although the rule requires that the applicant "intend that the State of New Hampshire will be his or her '[p]rincipal place of physical presence for the indefinite future to the exclusion of all others.'" *J.A.* p. 33 [Quoting from N.H. Rev. Stat. Ann. 21:6, (1983)], it is anticipated that from the moment of admission attorneys are free to change their intention and move out of state and that in fact numerous attorneys have done previously that. *J.A.* pp. 29-32. Thus the coverage of the rule is limited to the period prior to admission.

Secondly, residency is defined to mean home domicile in New Hampshire. *J.A.* p. 65. Thus an out-of-state applicant like Ms. Piper cannot be admitted because of her Vermont home residence even though it was her intention to join a law office situated in New Hampshire. Conversely, a New Hampshire resident is permitted to join the New Hampshire Bar without maintaining an affiliation with a New Hampshire office. This contrasts to the requirement in Iowa which in its *amicus* brief acknowledges that it permits nonresidents to join its bar

if they demonstrate an intention "to establish an office for the practice of law in Iowa." Brief at 6, App. 4.

Thirdly, the New Hampshire residency rule as applied to out-of-state applicants is apparently absolute and permits no exceptions no matter how close the applicant's connections are with New Hampshire nor how deep his or her knowledge of New Hampshire law. This is in contrast to the rules of Tennessee which in its *amicus* brief acknowledges that its Board of Bar Examiner's has the discretion to admit a nonresident applicant if his or her "domicile and residence are established in an area closely contiguous to the boundaries of the State of Tennessee and in an area which is customarily regarded as a residential adjunct or suburb to the State of Tennessee." Brief at 4.

In evaluating the actual effect of the New Hampshire residency rule, it is also necessary to consider it in context with the other requirements for admission to the New Hampshire Bar. It is simply not the case as implied by New Hampshire that removal of the residency rule would lead to the nationalization of the bar. Quite apart from the residency rule, New Hampshire requires that all applicants pass a rigorous bar examination including one day's testing on local law and establish their moral character and fitness to the satisfaction of New Hampshire's Standing Committee on Character and Fitness. In addition, it requires that all successful applicants take a practical skills course which meets over the course of several weeks. New Hampshire Supreme Court Rules 42(1), (5), (7).

In attempting to justify its residency rule, New Hampshire makes reference to the problems that might be created by applicants from such far-removed locations as California and Hawaii and claims that focus upon

Ms. Piper's individual situation as a resident of a bordering state is inappropriate. In reality, however, her situation is far more typical of most out-of-state applicants than that of the hypothetical applicant from Hawaii. Although it is possible that several attorneys from distant locations may choose to apply if the residency requirement is removed, the reality is that the vast bulk of out-of-state applicants will come from contiguous states. It simply does not make much sense for most people intending to reside in distant locations to devote the time and expense inherent in applying for and remaining in the New Hampshire Bar.[14] If New Hampshire is really concerned about a flood of applicants from Hawaii, then it could adopt a less restrictive rule limited to applicants living more than a given number of miles from the state. As this Court stated in *In re Griffiths*, 413 U.S. 717, 725 (1973), the fact that some aliens may by reason of their country of citizenship be unsuited to membership in the bar, is not sufficient reason to exclude all of them.

The justifications offered by New Hampshire also presume that out-of-state applicants only intend to maintain a very slender connection with practice in New Hampshire and thus will lack knowledge of New Hampshire law and incentive to develop a good professional reputation. But again this assumption is unrealistic. Because application to and membership in the New Hampshire Bar involves a serious commitment of time

14. Applicants must spend several exhausting months studying for the bar and $185.00 for the cost of testing and having their character investigated. If they are successful, they automatically join the New Hampshire Bar which is integrated and after their first year pay a membership fee which is currently set at $125.00 a year in addition to any special assessments that may be made. In the first year they are also required to take a mandatory practical skills course.

and money, it is hardly likely that any individual would go through this process unless he or she intended to engage in a substantial amount of New Hampshire practice.

1. The justifications advanced in support of the New Hampshire rule.

a. Familiarity with local rules and procedures.

The first justification cited by New Hampshire for its residency rule is to ensure familiarity with local rules and procedures. Brief at 29-30. There is no dispute that this is a substantial goal but there has been absolutely no showing nor any reason to believe that out-of-state applicants or attorneys who pass the other requirements for admission would be deficient in this area. The contrary conclusion has been reached by the state and federal courts that have considered this question. *See, e.g., In re Judd*, 391 Mass. 227, 234, 461 N.E.2d 760, 764 (1984); *Stidland v. South Dakota Board of Bar Examiners*, 550 F. Supp. 155, 159-160 (D.S.D. 1982); *Sargus v. West Virginia Board of Law Examiners*, 294 S.E.2d 440, 445 (W.Va. 1982).

While living in a certain area may contribute to one's knowledge of local topography, there has never been any explanation as to how it in itself effects one's knowledge of local law and procedure. It appears that the underlying assumption is that attorneys residing outside the state will only engage in New Hampshire practice on an occasional basis and thus will become less knowledgeable about it. But in view of the substantial requirements for joining and remaining a member of the New Hampshire Bar, this is not a plausible assumption.

b. Exposure to unique New Hampshire problems.

New Hampshire also attempts to justify its residency requirement on the basis that it gives attorneys exposure to the "problems, needs and desires" of New Hampshire citizens. Brief at 30. But it has not presented any evidence that the unique "problems, needs and desires" of clients can be categorized according to state of residence. Even if they could, the requirement of residency for this purpose would appear to run afoul of the principle set forth by this Court in *Schware v. Board of Bar Examiners*, 353 US 232, 238 (1957), that "any qualification [for admission to the bar] must have a rational connection with the applicant's fitness or capacity to practice law." As the court stated in *Keenan v. Board of Law Examiners*, 317 F.Supp. 1350, 1359 (E.D.N.C. 1970): "[we] find no rational relationship between 'fitness or capacity to practice law' and a knowledge of 'local custom'. Neither legal competence nor ethical fitness depends upon cultural provincialism."

New Hampshire's reliance upon *Chimento v. Stark*, 353 F.Supp. 1211, *aff'd* mem., 414 US 802 (1973), illustrates the insufficiency of this justification. That case upheld a seven year residency requirement for governor. However, the need for the governor to have prior experience with special state problems is qualitatively different than that of members of the private bar. If clients want an attorney who can empathize with their problems and if they believe that this ability is fostered by in-state residency, then of course they are free to select somebody from their own community.

Accepting New Hampshire's argument, it would follow that in-state residency should be required for any occupation which involves dealing with other people. However, the New Hampshire Supreme Court has itself voided statutes regulating other professions which make distinctions based upon state or town residence. *See, e.g., Donnelly v. Manchester*, 111 NH 30, 274 A.2d 789 (invalidating residency requirement for classified city employees); *Warren K. Tontine Studio, Inc. v. Portsmouth*, 95 NH 171, 59 A.2d 475 (1948) (invalidating ordinance requiring photographers from outside of city to pay licensing fee); *State v. Lancaster*, 63 NH 267 (1884) (requirement of license for out-of-state tree salesmen violates the Privileges and Immunities Clause); *State v. Pressey*, 65 NH 113 (1889) (voiding licensing fee for doctors which has exemptions based upon length of residence in same town); *Bliss's Petition*, 63 NH 135 (1884) (Privileges and Immunities Clause secures out-of-state citizen's right to peddler's license).

c. Attorney's reputation.

New Hampshire also justifies its rule on the basis that it makes an attorney more concerned about developing a good relationship with other lawyers and judges. Brief at 30-31. But again, there has been no showing that out-of-state applicants or attorneys are less concerned about their legal reputation than their in-state counterparts, or that requiring applicants to move to New Hampshire is going to enhance their concern about their legal reputation. It would appear obvious that one's professional reputation is important to all attorneys. Insofar as there is any basis for this justification, it is again the fallacious assumption that nonresident applicants after undertaking the effort to apply for and join the New Hampshire Bar will only engage in very occasional practice within the State.

New Hampshire emphasizes the advantages of peer pressure but it does not assert that its formal disciplinary processes and sanctions are an insufficient deterrent to unethical behavior. Further, New Hampshire overlooks the peril that this same peer pressure might dissuade attorneys from representing unpopular clients or taking unpopular positions.

d. Availability for court appearance and disciplinary proceedings.

New Hampshire asserts that attorneys residing in-state will be more available for court appearances and disciplinary proceedings. *Id.* at 31. However, it again fails to make any showing of a problem in this area posed by out-of-state applicants or attorneys. In considering the same claim with respect to the Massachusetts bar, the Supreme Judicial Court concluded that even though the Massachusetts Bar has 5,000 nonresident members, there was no evidence of any problem securing the service of process on them or obtaining jurisdiction over them for the purposes of bar discipline. *In re Judd*, 391 Mass. 227, 234, 461 N.E.2d 769, 765 (1984). Further, it noted that there was no evidence that nonresident attorneys created any special problem in failing to show up for court appearance. 391 Mass. at 235, 461 N.E.2d 765.

In asserting a need for the rule to assure availability for disciplinary proceedings, New Hampshire ignores two safeguards already in place that secure this objective. As noted by the district court, N.H. Rev. Stat. Ann. 310:4 (1982) gives the State long-arm jurisdiction over nonresident members of the bar. 539 F.Supp. at 1064. J.S. p. 6a. In addition, New Hampshire Supreme Court Rule

Kellar provides that "[a]ny attorney admitted to practice law in this State or any attorney specially admitted to practice by a court of this State is subject to the disciplinary jurisdiction of this court and the committee on professional conduct. . . ."

The same type of argument invoked by New Hampshire was made by the State of Texas to justify excluding resident aliens from becoming notaries. The claim was rejected by this Court on the ground that the State "fails to advance a factual showing that the unavailability of notaries' testimony presents a real, as opposed to a merely speculative problem to the State." *Bernal v. Fainter*, 104 S.Ct. 2312, 2320 (1984). Not only is the claim here speculative, but it also rests on the faulty assumption that in the absence of the residency rule most nonresident attorneys will reside in distant locales. Again, the reality is that most of them like Mr. Piper will live closer to many New Hampshire courts than some of their counterparts residing in-state.

e. Participation in pro bono activities.

Finally, New Hampshire asserts that its residency rule promotes performance of volunteer legal work by members of the bar. But New Hampshire does not explain how opening up the bar to additional attorneys will cause a diminution in volunteer service performed. The assumption that the average nonresident attorney will perform less voluntary *pro bono* activity than the average resident is again based on the fallacious premise that nonresident applicants after admission would reside in distant locales and only occasionally venture into New Hampshire. But even were it true that New Hampshire residents would perform more volunteer work, the addi-

tion of a previously excluded class of practitioners would almost certainly increase rather than diminish the total volume of *pro bono* work performed.

f. Other justifications.

In addition to the justifications submitted by New Hampshire in its brief, the Chief Justice in his affidavit also states that non-residents cannot be expected to comply with the bar membership oath affirming that members of the New Hampshire Bar will be officers of the court and support the New Hampshire Constitution. J.A. pp. 22-23. N.H. Rev. Stat. Ann. 116 (1983). This Court, however, has specifically rejected the argument that a resident alien from the Netherlands applying to the Connecticut bar is unable to take an oath to support the constitution of that State. *In re Griffiths*, 413 US 717, 726, n. 10. It follows a fortiori that such an argument is not a valid justification for the exclusion of an American citizen from the bar of another state.

As an additional justification, the State of Iowa asserts in its amicus brief that out-of-state lawyers are less committed to meeting requirements for continuing legal education and paying their client's security fund fees. Brief at 5. Statistics presented in the Iowa brief were not introduced at trial and thus have not been subject to full scrutiny. But even a superficial examination makes clear that they are at best peripherally pertinent because they only cover resident attorneys who subsequently moved out-of-state.[15]

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15. It is natural that some members of this class have moved out-of-state to relocate their practice in other jurisdictions and accordingly have no interest in continuing legal edu-

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Finally, Iowa asserts that abandoning the residency requirement would encourage a flood of applications which would be burdensome for the state to process. Even if this unlikely contingency were to materialize, New Hampshire could cover the additional expenses incurred through fees charged applicants for the right to apply. Furthermore, this type of administrative convenience argument lacks significant weight relative to the constitutional rights of bar applicants.

Judges Campbell and Bowyer also offer the justification that abolition of the residency requirement might lead to domination of the New Hampshire Bar by large firms from distant states. 723 F.2d 119, J.S. p. 17a. But there has been absolutely no evidence offered that out-of-state firms have the ambition or the ability to dominate the New Hampshire Bar. Even, however, were this a plausible goal of protecting the local bar from out-of-state firms is virtually indistinguishable from the protectionism the judges themselves found so being illegitimate.

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cation in Iowa nor in maintaining a client's security fund for Iowa clients. It is certainly to be anticipated that some of these attorneys might be suspended before they formally communicated their desire to leave the Iowa bar. But there is absolutely no showing that these suspensions hurt any clients nor detracted from the quality of legal practice in Iowa. Notwithstanding its study, Iowa itself permits nonresidents to join the Iowa bar if they "demonstrate a bona fide intention to establish an office for the practice of law in Iowa." Brief at 6, app.6 (quoting Iowa Court Rule at 105). Had the Iowa study been conducted on this class it would have been far more instructive.

2. The New Hampshire residency rule bears no relation to the justifications advanced on its behalf.

Even were each of the justifications that have been advanced on behalf of the New Hampshire residency rule substantial and even were this Court to adopt the diminished standard of review proposed by New Hampshire, nevertheless the residency rule cannot pass muster because it is entirely lacking in a close relation to the purposes it is supposed to advance. To the contrary, the actual terms of the rule are so far removed from its stated justifications as to demonstrate that it is utterly lacking in any legitimate purpose.

Each and every justification advanced on behalf of the New Hampshire residency rule is only pertinent to admitted attorneys. Whether the intent be to enhance an attorney's familiarity with local rules, to increase reliance about legal reputation, or insure availability for court appearances, each of these justifications is only applicable upon admission. Nevertheless, New Hampshire has seen fit to only apply its residency requirement to persons applying for admission and, notwithstanding its stated concerns, has not taken any steps, such as requiring mandatory pro bono or continuing legal education, to counteract the claimed adverse consequences flowing from practice by nonresidents. The point is not that New Hampshire should adopt a continuing residency requirement after admission,[16] but that it cannot claim as justi-

16. Although a continuing residency requirement after admission would be even more restrictive than the New Hampshire residency rule, at least it would demonstrate that New Hampshire's concern over practice by out-of-state attorneys is more than a pretext to exclude potential competitors. See,

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fication for its rule the benefits that might arguably flow from other types of requirements.

New Hampshire has not explained why its residency rule is aimed at one target but all of its justifications are aimed at another. Its position appears to be that the class of out-of-state applicants serves as a rough approximation of the class of out-of-state attorneys. However, given the professional and social mobility of the contemporary legal profession, see Halter, "Toward the Multi-State Practice of Law Through Admission by Reciprocity," 53 Miss. L.J. 1 (1983), this assumption appears to be entirely unwarranted.

The New Hampshire Bar residency rule is also divorced from its justifications inasmuch as it permits membership in the bar by in-state residents who intend to practice principally or exclusively out-of-state, but denies membership to out-of-state residents wishing to open or join an office in New Hampshire. With the possible exception of the questionable justification of further expense to unique New Hampshire problems, every reason

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Note, "A Constitutional Analysis of State Bar Residency Requirements under the Interstate Privileges and Immunities Clause of Article IV," 92 Harv. L.Rev. 1461, 1484-89 (1979). Needless to say, Ms. Piper does not advocate a continuing residency requirement after admission. But if one were adopted, at least she would have the political benefit of the considerable clout of those admitted members who would be adversely affected. Although the bar admission requirements are set by the Supreme Court rather than the Bar Association, the bar has significant input. The practice of "admission by reciprocity" where one state conditions the generosity of its admission standards upon the generosity of the standards in the state in which the applicant practices illustrates the impotence of the self-interest of the bar in shaping admission standards. See Halter, "Toward the Multi-State Practice of Law Through Admission by Reciprocity," 53 Miss. L.J. 1 (1983).

advanced for the residency rule depends upon the locale in which the attorney practices, not where he resides. Nevertheless, New Hampshire, in order to further such goals as increasing knowledge of court hearings and availability for court procedures, requires an in-state residence but not an in-state office. If instead the rule required an in-state office, not only would it have a better relation to its claimed justifications, but it would also be less restrictive because it would permit out-of-state applicants like Mr. Piper to meet the residency requirement without having to move her home and family.

Discordance between the rule's operation and its claimed justifications is particularly glaring because the rule could be so readily redrafted to require an in-state office if New Hampshire really intended that the rule achieve the justifications cited. The divergence in this case is even greater than that in *Lloyd A. Fry Roofing Co. v. Wood*, *Apple Advertising Commission*, 432 U.S. 333, 353 (1977), where the State justified a statute challenged on commerce clause grounds on the basis of a claimed motivation to protect consumers although in actual operation the statute principally affected wholesalers. In both cases, the discordance between the actual terms of the discriminatory provision and its claimed justifications illustrate that the rule is based upon premises other than those stated. *See Cabell v. Chavez-Salido*, 454 U.S. 432, 440 (1982).

Lack of fit between the actual provisions of the New Hampshire rule and its claimed justifications is further illustrated by the fact that with respect to each claimed goal, there are other alternative means far less discriminatory and far more directly connected to the stated goals which New Hampshire could adopt. If there is a problem with respect to knowledge of local rules and proce-

dures, it would make far more sense to require continuing legal education rather than hope that an attorney can maintain his knowledge by virtue of the place of his residence. In regard to exposure to unique New Hampshire problems, courses in local history and the like would appear better calculated to serve the goal. To address potential disciplinary problems, it would be far more effective to require continuing legal education in ethics or strengthen the bar's disciplinary mechanisms or sanctions. To respond to the problem of missing court appearances, it would make more sense to directly sanction the offenders rather than barring all out-of-staters. If there is a problem finding volunteers to perform pro bono work, New Hampshire could make such an obligation mandatory.

New Hampshire is not under an obligation to adopt the most direct solution for each problem that it identifies. But when it chooses to adopt a "solution" which relies upon a type of classification expressly prohibited by Article IV and which excludes a class of applicants who do not at the time of exclusion pose any of the dangers cited, then at least it has the obligation to consider whether it might be able to achieve its legitimate goals in a less exclusionary fashion. The significance of the availability of less exclusionary alternatives under privileges and immunities analysis was emphasized by this Court in its opinion in *Toomer v. Witsell*, 334 U.S. 385, 398-99 (1948), where in declaring unconstitutional a state statute that imposed higher licensing fees on nonresident shrimpfishermen, it itemized some of the less restrictive alternatives the State could have pursued to achieve its claimed goals. This Court concluded that "[s]o would be closing our eyes to reality, we believe, if we concluded that these

was a reasonable relationship between the dangers represented by non-citizens, as a class, and the severe discrimination practiced upon them." The same is true in this case.

III. The New Hampshire residency requirement is in violation of the Commerce Clause.

Although the courts below had no occasion to consider a Commerce Clause argument once petitioner's claim in favor of her privileges and immunities claim, the Commerce Clause provides an independent and sufficient ground for affirming the district court's opinion. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975), this Court stated that "[i]n the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce." By comparison to the minimum fee schedule examined in that case, this case involves a substantially more extensive restraint since an entire category of attorneys and potential competitors to the local bar are frozen out of competition solely because of their out-of-state residences.

This Court has stated that the purpose of the Commerce Clause is to prevent an "economic Balkanization" between the states. *South Central Timber Development, Inc. v. Wunnicke*, 104 S. Ct. 2237, 2243 (1984); *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). This is precisely the effect of a bar residency requirement which makes the local bar's monopoly over legal practice virtually impenetrable to outsiders.[17] In determining its validity under

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17. The anticompetitive effects of the New Hampshire Rule are described more specifically in the amicus briefs filed on behalf of Ms. Piper.

the Commerce Clause, "the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 353 (1977). As discussed *supra*, that test cannot be met in this case because there are no local benefits aside from protectionism and there are numerous nondiscriminatory or less discriminatory alternatives.

It appears to be New Hampshire's position that its residency requirement should not be scrutinized under the Commerce Clause because it is motivated by noncommercial purposes. But even if the intent is noncommercial, this Court has made it clear that a violation of the Commerce Clause can be based on a finding of discriminatory effect even in the absence of a discriminatory purpose. *Hoechst Imports, Ltd. v. Dias*, 52 U.S.L.W. 4979, 4981 (June 29, 1984). It has not hesitated to strike down discriminatory statutes justified on the basis of public health, safety or some other legitimate noneconomic local concern where the actual benefits were insubstantial or could have been achieved by less discriminatory alternatives. *E.g., Kassel v. Consolidated Freightways Corporation*, 450 U.S. 662 (1981); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980); *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977). Because the New Hampshire residency rule only serves the cause of protectionism, it should also be held to be in violation of the Commerce Clause.

IV. Requiring residency for admission to the bar without imposing a continuing residency requirement upon practicing attorneys violates the right to equal protection of out-of-state applicants to the bar.

Although the courts below did not reach Ms. Piper's equal protection claim because of the decision in her favor on the privileges and immunities ground, that claim provides an independent and sufficient basis for upholding the district court's opinion. As defined and applied by the New Hampshire Supreme Court, the residency requirement for bar applicants discriminates against them as compared to the category of admitted members of the New Hampshire Bar who are not required to maintain residency. Again, it is not Ms. Piper's claim or desire that New Hampshire impose a continuing residency requirement. However, it is her position that if a residency requirement is in fact necessary to protect the quality of legal practice, then the Equal Protection Clause demands that it should be applied equally against those practicing as against those seeking the opportunity to do so.

Each and every justification advanced by New Hampshire for its residency requirement relates solely and exclusively to persons already admitted to the bar. *See pages 21-22, supra.* New Hampshire implicitly concedes as much by not requiring residency until the time of admission. Nevertheless, it has offered no justification for applying the requirement solely against applicants. Judges Campbell and Breyer attempt to defend this anomaly on the ground of administrative convenience. 723 F.2d. 118, 122 n. 4, J.S. p.22a n. 4.

In reviewing this discrimination against bar applicants, it should be emphasized that although there is no right to practice law without meeting the reasonable ad-

mission standards of the host state, *L. to v. Flynt*, 459 U.S. 438 (1979), this Court has held that it "is not a matter of grace, but of right for one who is qualified by his learning and his moral character." *Baird v. State Bar of Arizona*, 401 U.S. 1, 8 (1971). For Ms. Piper, the practice of law is her livelihood and this Court has repeatedly emphasized the fundamental importance of an individual's right to pursue a livelihood. *E.g., Baldwin v. Montana Fish & Game Commission*, 436 U.S. 371 (1978).

Secondly, although bar applicants are not a suspect class, the class of out-of-state bar applicants are deserving of special constitutional protection because they are entirely lacking any representation in the government of the state from which they are being excluded. As this Court stated in *South Central Timber Development, Inc. v. Wunnicke*, "[u]nrepresented interests will often bear the brunt of regulations imposed by one state having a significant effect on persons or operations in other states." 104 S. Ct. 2237, 2243 (1984). If the New Hampshire Bar generally were disadvantaged by this rule, then it could be assumed that the New Hampshire Supreme Court, whose membership is selected from the New Hampshire Bar, could fairly take this effect into account. But where the rule actually benefits the New Hampshire bar and only impinges upon the opportunities of those without the state, the same assumption cannot be made.[18]

In view of the important right involved and the discriminatory impact upon outsiders, administrative convenience should not be considered as sufficient justification for excluding out-of-state applicants when all the

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18. See note 16, supra.

claimed benefits stem from residence after admission. *Cf. Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (administrative convenience insufficient ground for denying father's hearing prior to removal of children). Out-of-state applicants should be accorded the same freedom to choose their place of home residence as admitted attorneys.

CONCLUSION

For the foregoing reasons, Ms. Piper respectfully requests that the judgment below be affirmed.

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REPLY

BRIEF

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In The

Supreme Court of the United States

October Term, 1984

SUPREME COURT OF NEW HAMPSHIRE,
Appellant,

v.

KATHRYN A. PIPER,
Appellee.

On Appeal From the United States Court of Appeals for the First Circuit

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TABLE OF CONTENTS

Page

Table of Authorities ..... (i)

Argument:

I. New Hampshire's Residency Requirement Does Not Violate The Commerce Clause Because There is No Basis for Concluding that the Requirement Creates An Unreasonable Barrier Against Interstate Commerce. 1

II. New Hampshire's Simple Residency Requirement Does Not Violate the Equal Protection Clause Because It Is Rationally Related To The New Hampshire Supreme Court's Legitimate Objectives In Regulating The State Bar. 4

Conclusion 6

TABLE OF AUTHORITIES

Cases

Aronson v. Ambrose, 479 F.2d 75 (3rd Cir. 1973) cert. denied 404 U.S. 854 (1973) 4

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 2, 4

Brown v. Supreme Court of Virginia, 359 F. Supp. 549 (E.D. Va.) aff'd mem. 414 U.S. 1034 (1973) 4

Dandridge v. Williams, 397 U.S. 471 (1970) 5

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) 2, 4

H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949) 2

Hughes v. Oklahoma, 441 U.S. 332 (1979) 2

TABLE OF AUTHORITIES—Continued

	Pages
Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1977)	4
Lois v. Flynt, 439 U.S. 438 (1979)	3, 4
Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980)	2
Martin v. Walton, 368 U.S. 25 (1961)	4
McGowan v. Maryland, 366 U.S. 420, 425 (1961)	5
Norfolk & Western Ry. Co. v. Beatty, 423 U.S. 1009 (1975)	3
Piper v. New Hampshire Supreme Court, 723 F.2d 98 (1st Cir. 1983) and 723 F.2d 110 (1st Cir. 1983)	3, 4, 5
Wilson v. Wilson, 416 F. Supp. 984 (D. Or. 1976) aff'd mem. 430 U.S. 925 (977)	4

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APPELLANT'S REPLY BRIEF

Appellant, Supreme Court of New Hampshire, submits this reply brief to address the Equal Protection and Commerce Clause claims made by appellee, Kathryn A. Piper, which were not addressed by the district court or the Court of Appeals *en banc*.

I. New Hampshire's Residency Requirement Does Not Violate The Commerce Clause Because There Is No Basis For Concluding That The Requirement Creates An Unreasonable Barrier Against Interstate Commerce.

Article 1, Section 8 of the Constitution limits the power of a State to create unreasonable barriers against

interstate commerce. *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979). As with the Privileges and Immunities Clause, this limitation on the exercise of power by a state to regulate matters of "legitimate local concern" is not absolute, even though interstate commerce may be affected by such legislation. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980). If a legitimate local interest is implicated, "finding the appropriate scope for state regulation is often a matter of 'delicate' adjustment". *Id.*, citing *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 553 (1949). Where, as here, New Hampshire's residency requirement for bar admission stems from the close relationship between control over the state bar and the state's ability to function as a sovereign entity, a matter of legitimate local concern is obviously involved.

Furthermore, although this Court has recognized that certain aspects of the practice of law constitute "commerce" or "commercial activity" *(Goldfarb v. Virginia State Bar*, 421 U.S. 773, 778 (1975); see also, *Bates v. State Bar of Arizona*, 433 U.S. 350, 371-372 (1977), the Court has also acknowledged that there are non-commercial aspects of the practice of law which distinguish it from purely commercial activity. *Goldfarb*, 421 U.S. at 778, n.17. More important, this Court in *Goldfarb* made clear that nothing in its decision limited "the authority of the State to regulate its professions", noting that the "[i]nterest of the State in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice." *Ibid* at 792-793. The Court reiterated this principle in *Bates*: "[t]he regulation of the bar is at the core of the State's power to

protect the public." 433 U.S. at 361. Thus, for purposes of Commerce Clause analysis, a state court's regulation of the state bar is unquestionably a legitimate local concern, the significance of which has been repeatedly recognized by this Court.

However, Ms. Piper's Commerce Clause argument seems to rest on a different assumption: that the simple residency requirement imposed by the Supreme Court of New Hampshire is solely intended to insulate New Hampshire attorneys from competition by out-of-state attorneys. Yet, there is no evidence in the record to support such an assumption, nor has any lower court made such a finding of fact. Additionally, Ms. Piper's argument ignores not only the substantial justifications advanced by the New Hampshire Supreme Court for its rule (see Appellant's Brief at pages 28-33), but also the fact that the residency requirement was promulgated by the New Hampshire Supreme Court, pursuant to its state constitutional authority, rather than by the State legislature or the state bar association. See, *e.g., Piper v. Supreme Court of New Hampshire*, 723 F.2d 110, 121 (1983).

Beyond its faulty premise, Ms. Piper's argument seems to assume that New Hampshire's residency requirement in fact has an impact on interstate commerce. Again, there is no record evidence or finding of fact to support such an assumption, and unsupported assertions in the *amicus* briefs do not supply the void. But even assuming that New Hampshire's residency requirement findably impacts interstate commerce, this Court has held that state bar regulations may treat non-resident attorneys differently from resident attorneys. *Leis v. Flynt*, 439 U.S. 438, 443 and 444 n. 5 (1979), citing *Norfolk &*

Western Ry. Company v. Beatty, 423 U.S. 1069 (1975), *summarily aff'g* 400 F. Supp. 234 (S.D. Ill. 1973); *Brown v. Supreme Court of Virginia*, 414 U.S. 1034 (1975) *summarily aff'g* 359 F. Supp. 549 (E.D. Va. 1973); see also, *Martin v. Walton*, 368 U.S. 25 (1961). Significantly, *Leis v. Flynt* was decided subsequent to this Court's limited recognition of the practice of law as a form of commerce in *Goldfarb*, *supra*, and *Bates*, *supra*.

Finally, the justifications advanced by the New Hampshire Supreme Court for the requirement of simple residency are more than adequate to meet the State's burden under the Commerce Clause. *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 353 (1977). Thus, the Commerce Clause provides no independent and sufficient ground for affirmance in the case.

II. New Hampshire's Simple Residency Requirement Does Not Violate The Equal Protection Clause Because It Is Rationally Related To The New Hampshire Supreme Court's Legitimate Objectives In Regulating The State Bar.

Simple, non-durational residency requirements such as New Hampshire's requirement have consistently withstood challenges based upon the Equal Protection Clause. *See, e.g. Aronson v. Ambrose*, 479 F.2d 75 (3rd Cir. 1973) *cert. denied* 404 U.S. 854 (1973); *Wilson v. Wilson*, 416 F. Supp. 984 (D. Or. 1976) *aff'd mem.* 430 U.S. 925 (1977); see also, *Brown v. Supreme Court of Virginia*, 359 F. Supp. 549 (E.D.Va. 1973) *aff'd mem.* 414 U.S. 1034 (1975) and cases cited in *Piper*, 723 F.2d 98, 105. Ms. Piper's case is no different simply because the Supreme Court of New Hampshire does not revoke the licenses of

attorneys who leave the State of New Hampshire at some point after admission to the state bar. As she concedes, out-of-state applicants for admission to the bar are not a suspect classification, which would justify a more intense level of federal judicial scrutiny. Appellant's Brief at p. 39. Thus, if the residency requirement imposed by the Supreme Court of New Hampshire has a rational basis, Ms. Piper's equal protection challenge must fail.

As the original opinion of the Court of Appeals correctly recognized, the residency requirement ensures that lawyers who are admitted to the New Hampshire bar begin their practice in New Hampshire. *Piper*, 723 F.2d 98, 104. Given the commitment required for successful completion of the admission requirements, the Supreme Court of New Hampshire could reasonably have concluded that only a small number of attorneys would give up their residence in the state, but not their practice within the state. *Ibid*, n. 11. The objective of the Supreme Court of New Hampshire in imposing a residency requirement was to ensure performance of the obligations which it requires of members of the New Hampshire bar in the course of its definition of the practice of law within the State. The distinction between out-of-state applicants for admission to the Bar, and attorneys who have been admitted, but then leave the State does not rest on a ground "wholly irrelevant to the achievement of the State's objectives." *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961). As this Court has consistently held, a challenged regulation should not be invalidated under the Equal Protection Clause simply because it does not cover every conceivable situation. *Dandridge v. Williams*, 397 U.S. 471, 486 (1970).

CONCLUSION

For the reasons stated, neither the Commerce Clause nor the Equal Protection Clause provides an independent and sufficient ground for affirmance. The Supreme Court of New Hampshire urges the Court to reverse the judgment of the Court of Appeals *en banc*.

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